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United States
Circuit Court of Appeals
For the Ninth Circuit

Brief of Appellee

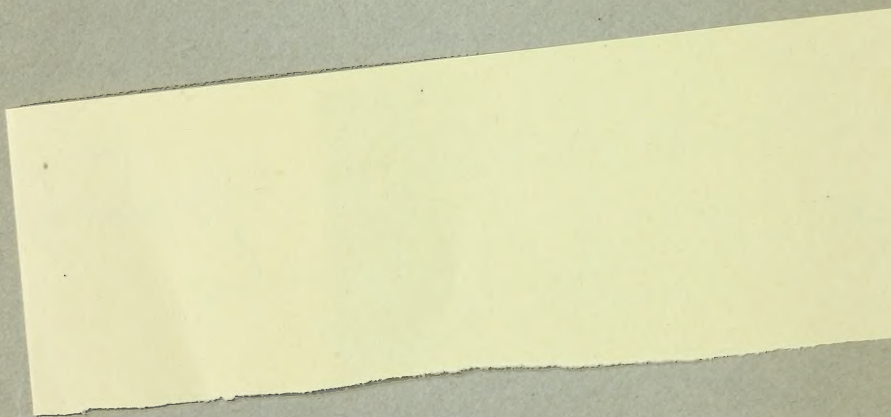
MORSE S. DUFFIELD and
LEWIS A. JEFFS,
Appellants,
vs.
SAN FRANCISCO CHEMI-
CAL COMPANY, a corpora-
tion,
Appellee.

Upon Appeal from the United States District Court for
the District of Idaho, Eastern Division.

CLARK & BUDGE,
Counsel for Appellee.

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No. 2203

United States
Circuit Court of Appeals
For the Ninth Circuit

Brief of Apellee

MORSE S. DUFFIELD and	}
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Upon Appeal from the United States District Court for
the District of Idaho, Eastern Division.

STATEMENT OF THE CASE.

We cannot agree to the proposition announced in appellants' statement of the case that the one controlling question here is whether the valuable mineral deposit upon which the respective locations of the parties were made can be secured by placer locations or by lode locations. As we view the law, this question is one which the court has no jurisdiction to determine, but is for the Land Department alone. The only question before this court is: Who has the right of possession of the conflict area? and the answer to this inquiry does not involve a consideration of the character of the entry by which the mineral deposit may be acquired. At the taking of testimony before the Special Examiner, it was stipulated,

“that on or about the 8th day of July, 1904, as to the Windfield, Winter, Wonder and Winslow Placer Mining Claims; that on or about the 22nd day of August, 1904, as to the Wilmington Placer Mining Claim; that on or about the 11th day of June, 1904, as to the Colcock and Inman Placer Mining Claims, and on or about the 3rd day of December, 1905, as to the Wizard Placer Mining Claim (all of which said claims are particularly described in the cross-bill herein), the predecessors in interest of the defendant, the San Francisco Chemical Company, performed all the acts required by law in respect to making a discovery upon said claims respectively, and in performing the requisite

discovery work, and in duly marking the boundaries of said placer mining claims, and each of them, and in posting notices of location, and that the location notices so posted were in due form, and that copies thereof in due form were duly recorded; also that the requisite work of at least \$100.00 per year had been performed for the benefit of placer mining claims during each calendar year since the location of said claims respectively, and that proofs in due form have been made of said work, and that said proofs have been duly recorded.”

It was further stipulated

“That on or about the 15th and 16th days of November, 1907, the complainants, Morse S. Duffield and Lewis A. Jeffs in respect to the Obey, Obed, Jimtown, Fentress, Cumberland, Overton, Mount Pleasant, Arkansas, Hickman, Columbia and Wade Lode Mining claims, described in the bill of complaint herein, performed all the acts required by law in respect to making a discovery upon said claims respectively, and in performing the requisite discovery work, and in duly marking the boundaries of said lode mining claims, and each of them, and in posting notices of location, and that the location notices so posted were in due form, and that copies thereof in due form were duly recorded; also that the requisite work of at least \$100.00 per year has been performed for the benefit of said lode mining claims during each calendar year since the location of said claims respectively; and that

proofs in due form have been made of said work, and that said proofs have been duly recorded.

“Provided, however, that this stipulation is not intended to destroy the effect, if any, of any evidence now in the record, or which may hereafter be taken on behalf of the defendant as to the circumstances under which said lode locations were made, and said assessment work for the benefit of said mining claims was performed; it being the intention to stipulate only as to the performance by each party of the physical acts required by the laws of the United States and of the State of Idaho in the location of placer and lode claims respectively, and in the performance of assessment work, and in the making of proof thereof.

It was further stipulated

“That the record titles to the placer and lode claims respectively, are in the respective parties as alleged in the pleadings; that the deeds of conveyance from the predecessors in interest of the defendant of the said placer claims were made on the 28th day of August, 1906, acknowledged and delivered September 13, 1906, and recorded July 27, 1910.” (Rec., 453 and 505).

According to the evidence, the circumstances under which the lode locations were made and the assessment work performed are as follows: Appellants Duffield & Jeffs went upon the ground in controversy on the 14th day of November, 1907, and proceeded to perform discovery work, and to mark upon the ground the boundary lines of their several lode claims, and to post notices of loca-

tion. While they were engaged in this work, to-wit: on or about the 6th day of December, 1907, and prior to the recording of the notices of location for said lode claims, the employes of appellants, Colebath and Samson by name, at work on the ground (Rec., 491) and Mr. Duffield himself in the City of Montpelier, near the office of the defendant (Rec., 492) were notified by R. A. Sullivan, and W. F. Ferrier, agents of the appellee, that the ground upon which they were attempting to make locations had all been located and was the property of the defendant, and they were further forbidden to do any work upon the premises, or to remain upon the same.

Again on the 6th day of January, 1908, and prior to the recording of the notices of location of said lode claims—said notices not having been filed for record until the 17th day of January, 1908—(See Appellants' original Exhibits Nos. 2 to 12, typewritten transcript complainants' evidence, pp. 101 to 127, and stipulation filed here February 20, 1913) appellants were again notified by Mr. Sullivan that they were trespassers on the property of the defendant, and were ordered off the premises. (Rec., 489, 490).

Prior to the time appellants had made any surveys, or had made any discoveries, or had established any corners, they had full information that the premises in dispute were occupied by appellee (Rec., 150, 151, 153, 155, 175); that the lode locations which they intended to make upon the premises would be in conflict with appellee's claim to the mineral deposit of lime phosphate included within said placers. (Rec., 155, 175).

In the fall of 1908, a man named Wilcox, and others with him, employes of appellants, were by appellee forbidden to do assessment work on the lode claims, and they left the premises (Rec., 169). A suit was commenced by appellants and an order issued against the predecessors in interest of appellee (who then held the record title to the placer claims), restraining them from preventing appellants from doing assessment work and thereafter an agreement was reached between counsel for the respective parties in said suit whereby appellants, on condition that said suit be dismissed, were permitted to do assessment work for the year 1908 only (Rec., 172); that appellants when thus allowed to go upon the premises wrongfully and in violation of the agreement, remained there during the forepart of 1909 until the assessment work for that year also had been done (Rec., 175). Again in 1910 appellants were notified that they were trespassers when they attempted to do assessment work. (Rec., 168). The foregoing recital presents the facts essential to a determination of this case.

On the 11th day of August, 1910, appellee filed in the United States Land Office at Blackfoot, Idaho, its application for patent for the aforesaid placer mining claims, and on the 8th day of October, 1910, appellants filed in said land office their adverse claim against the entry of said placers. Thereafter, and within the time prescribed by law, appellants commenced this suit to quiet title as an adverse suit under Section 2326 of the Revised Statutes of the United States.

ARGUMENT.

QUESTION OF WHETHER GROUND LOCATABLE AS LODE OR PLACER IS FOR LAND DEPARTMENT.

The sole question for determination is: Who has the right of possession of the conflict area?

R. S., U. S., Sec. 2326.

Costigan on Mining Law, p. 374.

Burke vs. McDonald (Ida.), 13 Pac., 351, 353.

Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221; 48 L. Ed., 944.

Under the stipulation of the parties (Rec., 453), which recognizes the priority of appellee's locations and its compliance with the laws of the United States and of the State of Idaho with respect to making locations and the performance of assessment work, the District Court very properly rendered judgment for the appellee. (198 Fed., 942). Notwithstanding the stipulation, appellants argued that it was the duty of the court to classify these lands and determine under what form of entry the government should part with its title; this the court declined to do. To quote:

"It would seem to be thoroughly well settled, not only by the Land Department, but the courts, that the action authorized by Section 2326, R. S. (U. S. Comp. St., 1901, p. 1430), is purely possessory in character. The paramount title in the land,

the fee, resting in the government, the inquiry which is submitted by the statute to be tried as between the contending claimants in an adverse suit, no matter what the form of action adopted, which may vary in different jurisdictions, is solely as to those questions which will enable the court to say which of the contesting claimants is prior in right under the law to the present possession; that all other questions, including that of the character of the land in dispute, are committed by the statute to the Land Department as a special tribunal, which alone has authority to decide them, and whose determination is final and conclusive upon all departments of the government, including the courts."

This announcement of the law is abundantly supported by the authorities. Sec. 441, R. S., U. S., among other things, provides that the Secretary of the Interior "is charged with the supervision of public business relating to public lands, including mines." And Section 453 provides:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

In explanation of the jurisdiction of the Land Department, Mr. Justice Field, in *Steel vs. St. Louis*

Smelting, etc., Co., 27 L. Ed., 226, uses the following language:

“We have often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established, to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, *the nature of the land*, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.”

Other courts also have declared:

“The Land Department of the United States (including in that term the Secretary of the Interior, the Commissioner of the General Land Office and their subordinates), is a special tribunal vested with judicial power to hear and determine the claims of all parties to public lands, which it is

authorized to dispose of and also with power to execute its judgments by conveyances to the parties it decides are entitled to them.”

U. S. vs. Railroad Co., 67 Fed., 948.

Germania Iron Co. vs. James, 89 Fed., 811.

King vs. McAndrews, III Fed., 860.

“It is a part of the daily business of that tribunal to hear evidence and argument, and to decide who has, by purchase, by pre-emption, by location of scrip or land warrants, or by any other recognized mode, established a right to any part of the public domain. It has determined thousands of such controversies, and the title of millions of acres of land rests upon its decisions.”

(Germania Iron Co. vs. James, 89 Fed., 811.)

“The Land Department of the United States has been created as the tribunal for determining the right under the laws of the United States of any person to receive a patent for any of the public lands, and that tribunal is vested with jurisdiction *to determine all questions of fact* that may arise in any controversy respecting such right. As a necessary result therefrom the determination by this tribunal of any question of fact is conclusive upon all other tribunals, wherever such questions may be presented. The character of the land, *whether it is subject to entry under the laws invoked therefor*, the qualifications of the entryman, the extent of the

improvement or reclamation made by him, whether such improvement is a sufficient compliance with the statutory provisions for entitling him to a patent, or whether it has been made within the time prescribed by statute, or, if not, whether the reasons offered by him are sufficient to condone such failure, or any default on his part; whether he has been guilty of laches, or exercised sufficient diligence, are all questions of fact, to be submitted to and determined by the Land Department.”

Gage vs. Gunther (Cal.), 68 Pac., 710, 712.

The foregoing authorities indicate the scope of the powers of the Land Department. The court is not concerned, in an adverse suit, with the question of the classification of the land. It has no right to say whether the land is mineral or non-mineral (Wright vs. Town of Hartville (Wyo.), 81 Pac., 649), neither can it decree that either party is entitled to purchase the land in controversy from the government (Gruwell vs. Rocco (Cal.), 74 Pac., 1028). It simply passes upon the question of the *right of possession*. (Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221; 48 L. Ed., 944). In the case last cited the plaintiff in error, an applicant for patent for certain lodes, was adversely by defendant in error, a placer claimant. Prior to the commencement of the adverse suit the defendant in error had applied for patent and its application had been denied, and this decision was relied upon as a defense by the lode claimant in the adverse suit. However, it appeared that the basis of the decision was not

that the ground was not placer, but that there was not before the Department sufficient proof of its placer character. The trial court held that inasmuch as the placer claim was prior in time and had been maintained according to law, it was valid, and the placer claimant was decreed the right of possession. This decision was affirmed by the supreme court of Colorado (68 Pac., 286), and by the supreme court of the United States. (Supra). In discussing the scope of its decision determining the right of possession, the federal supreme court says:

“We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives to them the lodes in controversy. In 2 Lindley on Mines, Sec. 765, the author thus states the law:

“‘Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, *to ascertain the character of the land*, and determine whether or no the conditions of the law have been complied with in good faith.’ ”

The court then quotes from an opinion by Mr. Secretary Lamar (4 Land Dec., 316), defining the effect of the decree in an adverse suit and the power of the Department with respect to the passing of title, and then continues:

“This opinion was cited as an authority by this court in *Perego vs. Dodge*, 163 U. S., 160, 41 L. Ed., 113, 118, 16 Sup. Ct. Rep., 971. See also *Aurora Lode vs. Bulger Hill and Nugget Gulch placer*, 23 Land Dec., 95, 103. The Land Office may yet decide against the validity of the lode locations, and deny all claims of the locators thereto. So, also, it may decide against the placer location, and set it aside; and in that event all rights resting upon such location will fall with it.”

After this adjudication the Clipper Mining Company made a second application for patent for its lode claims, which was resisted by the placer claimant; the latter contended that the decision of the courts awarding it the right of possession was binding upon the Land Department and was *res adjudicata* and, therefore, the department had no right to entertain the lode claimant's application. In discussing this question (Land Dec., Vol. 33, p. 660, 667), the Secretary of the Interior uses the following language:

“That the judgment of the court of competent jurisdiction pursuant to Section 2326, Revised Statutes, goes only to the question of the right of possession of a mining claim as between the parties litigant, and it remains in every case for the Land Department to determine all other questions touching the right to patent, are settled principles.”

* * * * *

“In most of the cases in which the force and effect of these judicial awards of the right of pos-

session have been considered, the adverse suits have arisen between rival lode or rival placer claimants, and certain it is that in any such case the patent must issue to the party prevailing, if to either. The contending parties asserting titles of the same character, both claiming the ground as mineral and both relying in the one case upon the lode, and in the other upon the placer character of the land in controversy, the judgment is conclusive and binding as between them. The mutually asserted character of the land thereafter established in the proceedings before the land department, the judgment claimant, rendering due compliance with the law in all other respects, is entitled to patent; but if, on the other hand, the land prove not to be of that character, neither party may receive patent, since both stand upon the same footing in that particular. Shown by proceedings before the land department in a proper case to be agricultural, not mineral, in character, the land, *though embraced in a prior judicial reward of the right of possession* to one of two contending mineral claimants, becomes at once subject to agricultural appropriation and patent.

“In the present case, it must be kept in mind, the foundation of the title set up by respondents is in their placer location. As placer claimants they adversed petitioner’s lode application, opposing their claimed placer possessory right to petitioner’s claimed lode right, and relying upon the rights arising under their placer location, if good, to defeat petitioner’s claim to the lodes, as unknown to

exist at the date of that location. The trial court found as a fact that the lodes were discovered and located, after the date of the placer location, by the grantors of petitioner; and it was solely because of the entry upon the placer location, as valid in its inception and still subsisting by reason of the continued performance of annual labor, in violation of the 'exclusive right of possession and enjoyment of all the surface included within the lines' thereof guaranteed by the statute, that the court held no rights to have arisen in the lode locators as against respondents. In other words, it was the right accruing to the latter as placer claimants which were held to have been invaded. A successful adverse claimant prevails upon the strength of his title under his own location, and is not subregated to possessory rights under the location of his defeated adversary. Having prevailed in the adverse suit solely on the strength of their placer location, only by virtue of their right to placer patent, if any, could they take title under the judgment roll to these lodes. They could take them, if at all, only as lodes within a placer. Obviously, unless their claim is of patentable placer character the lodes are not in that situation and as such available to respondents.

“As the land department may inquire, at the instance of an agricultural protestant, or of its own motion, concerning the character of the land *therefore involved in an adverse suit and awarded to one of the parties litigant*, and dispose of the land

as the facts may be found to justify, so may it inquire here as to the placer character of the land in controversy and adjudicate rights of the claimants thereto accordingly. This is in accordance with settled principles, and is plainly pointed out by the Supreme Court of the United States, thus:

“‘We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government or that the judgment necessarily gives to them the lodes in controversy.’

* * * * *

“‘The Land Office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.’

* * * * *

“‘If the land embraced in the placer location is found to be non-placer in the patentable sense, so that respondents cannot take title to the lodes in question in connection therewith, the basis of their claim to the lodes disappears, no prejudice to the claim of petitioner can have resulted from the judgment, and no obstruction to the completion of the latter’s patent proceedings, if in themselves regular, would then remain. Indeed, to hold otherwise would be to deny patent to both parties. Nearly ten years elapsed between the date of the hearing which re-

sulted in the rejection of the placer application and the date of the application for lode patent. What placer development may have occurred in the interval remains to be determined, for as of the latter date petitioner's rights are to be determined. Petitioner points out, as conclusive, the following admission in respondent's brief:

“ ‘Now, there is no dispute as to the present character of the ground here involved. It is admittedly lode.’

“ ‘If this could be taken as an unequivocal admission of the non-placer character of the land embraced in the placer location as of the date last mentioned, the case would seem to be relieved of further question. It cannot, however, be so taken.’ ”

This case seems to entirely cover in principle the case at bar. A petition for review was filed and in Vol. 34, at page 401 of the Land Decisions, the Secretary again expressed in a very well considered opinion these same views. To quote:

“ ‘Commenting upon the doctrine of rights arising under a valid location, as applied by the several courts in this case, counsel for respondents sum up the situation presented here, in the following clear and concise statement contained in their brief:

“ ‘The effect of this judgment, thus affirmed, under the clear language of Section 2326, leaves to the adverse claimants as the successful litigants the privilege of appearing with this judgment roll in the United States Land Department and making

thereon the statutory proof and payment and receiving patent.'

"The soundness of this conclusion the Department readily affirms. But the conclusion suggests in itself the pertinent question: What proof would be required? And in answer, *Proof of the patentably placer character of respondents' claim* must be included. Should that proof fail, respondents' rights under their judgment roll would fail."

The decisions of the department are in exact accord with the decision in said case by the Supreme Court of the United States. The department has all along assumed to pass upon and has determined the question of the character of land, whether subject to entry as agricultural land or as lode or as placer. Following are a few of such decisions:

H. J. Bennett, Jr., 3 Land Dec., 116.

McGleen vs. Wienbroeer, 15 L. Dec., 370.

Shepherd vs. Bird, 17 L. Dec., 82.

Alice Placer Mine, 4 L. Dec., 314.

Henderson vs. Fulton, 35 L. Dec., 652.

Gary vs. Todd, 18 L. Dec., 58.

Florida Cent., etc., R. R. Co., 26 L. Dec., 600.

Roy McDonald et al., 40 L. Dec., 7.

Utah Onyx Dev. Co., 38 L. Dec., 504.

In the case of Alice Placer Mine, above cited (the opinion in which was cited with approval by the United States Supreme Court in the Clipper Mining Company case), the court in the adverse suit had decided the right

of possession to be in the placer claimant, but the Commissioner of the General Land Office thereafter directed a hearing to determine the character of the land. Mr. Secretary Lamar in sustaining the action of the Commissioner, says:

“The question to be determined under said application is, whether or not you had the authority under the law to direct a hearing after judgment of the court favorable to applicant. I am asked to say that you have not such authority—that at such a stage of proceedings the law is mandatory, and that your remaining duties under Section 2326 of the Revised Statutes are merely the ministerial acts of preparing and issuing the patent. I am unable to assent to this proposition.

“It is too well settled to need discussion that until the issue of patent, title to the public land is in the United States, and that while so, and subject to disposal, the Land Department must, under the law, be the judge as to when, under what circumstances and how the Government shall part with title (*Moore vs. Robbins*, 96 U. S., 530). Not only must the character of the land be considered, but the law specified that certain prerequisite qualifications must exist and be found in the applicant for title. Certain precedent acts are also necessary. The law imposes upon the Land Department the duty of passing upon these various prerequisites, and determining when they have been met.

“This being true, can it be supposed that the intent of the law in such cases is to require the

issue of patent by the officer specially charged with the duty of disposing of the public lands under the law, before that officer is satisfied that the requirements of law have in good faith been complied with by the applicant? Can the Commissioner of the General Land Office be compelled to act upon the judgment of another in opposition to his own judgment in a case for the proper disposition of which the law holds him responsible, subject to the direction of the appellate or supervisory authority placed over him by the law itself?

“Does the judgment of the court as to which of two litigants has the better title to a piece of land bind the Commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law? The usual result following a favorable judgment in a court under Section 2326 of the Revised Statutes is, I doubt not, the issue of patent in due time, but in such case the final passing of title is not on the judgment of the court independent of that of the Commissioner, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.

“The judgment of the court is, in the language of the law, ‘to determine the question of the right of possession.’ It does not go beyond that. When it has determined which of the parties litigant is

entitled to possession, its office is ended, but title to patent is not yet established.

“The party thus placed in possession may ‘file a certified copy of the judgment roll with the register and receiver.’ But this is not all. He may file ‘the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.’ Why file this, or anything further, if the judgment roll settles all questions as to title and right to patent? Clearly, because the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent. His judgment should, therefore, be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. (*Branagan et al. vs. Dulaney*, 2 L. D., 744). The sufficiency of that proof is a matter for the determination of the Land Department. It follows, therefore, that further hearing may, if deemed necessary, be ordered for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith. To hold differently and to say that after the presentation of the judgment roll nothing

remains for the Commissioner save the ministerial acts of preparing and issuing patent, would be to say that the Land Department loses all jurisdiction in a case after commencement of suit by an adverse claimant. I am well satisfied that the law contemplates no such condition of affairs.

“The application is denied.”

Any determination by the court as to whether the ground is lode or placer would be of no binding force. As an expression of the opinion of this court it would, of course, be given due consideration, but as stated by Secretary Lamar, the Department would have a right to make a further inquiry, and if it may make further inquiry and ignore the court's conclusion as to the proper form of entry for the acquisition of the land in question, of what efficacy is the adjudication of the court? Even if the Land Department should agree with the court's conclusion as to the proper form of entry for phosphate lands, the fact that the determination of that question is ultimately with that department independently of the court's finding, would make such finding at best merely advisory, and courts are not established to render advisory decrees. If the Land Department may itself finally determine whether the land is patentable as lode or as placer, then jurisdiction as to that question is with it. “The test of jurisdiction is not right decision, but the right to enter upon the inquiry and make some decision.” (King vs. McAndrews, 111 Fed., 860). And inasmuch as the classification of the land is a matter connected with the determination of how title shall pass from the government rather than

with an ascertainment of who is entitled to possession, the Land Department certainly has jurisdiction to make such classification. Should the Department, after the court has awarded right of possession to the placer claimant, determine from an independent investigation that the land is non-placer in character, appellants might then proceed to perfect their proceedings for patent under their lode locations. As stated by the Honorable Secretary of the Interior in the Clipper Mining Company case (33 L. Dec., 660, 667):

“If the land embraced in the placer location is found to be non-placer in a patentable sense, so that respondents cannot take title to the lodes in question in connection therewith, the basis of their claim to the lodes disappears, no prejudice to the claim of petitioner can have resulted from the judgment, and no obstruction to the completion of the latter’s patent proceedings, if in themselves regular, would remain. Indeed, to hold otherwise would be to deny patent to both parties.”

It may be argued that should this court award possession to appellants on the basis that the land is only locatable as lode and the Land Department should thereafter hold the land to be placer, appellee might then, under the law as above announced, proceed to perfect its patent proceedings, but to this suggestion we reply that it is not the province of the court to determine the only question upon which appellants rely to deprive appellee of the right of possession. If appellee must lose its claims notwithstanding it is prior in time and has com

plied with all requirements in maintaining them, it should be because of a classification of the lands made by the tribunal established by law for that purpose and not because of a classification by the court. The court should award appellee right of possession no matter what the Land Department may hereafter do in the exercise of its powers. Whichever party prevails in the contest concerning the character of the land and the form of entry, let him prevail by virtue of the determination of those questions by the proper tribunal. Counsel may say that the Land Department has lately decided in the Harry lode case that phosphate rock is locatable as lode. It did so decide so far as that claim was concerned (which, by the way, supports our contention that it is the duty of the Land Department and not the court to decide the question), but it has also heretofore held that it was also patentable as placer, for it awarded appellee a patent for its "Waterloo" placer (Rec., 157), and on November 9, 1911, awarded it a patent for its "Windward" placer pursuant to the order of Assistant Commissioner Proudft, date July 8, 1911 (Defendant's Original Exhibit X), wherein he states "since location was made and perfected prior to withdrawal *and the phosphate appears to be in the form of a placer deposit*, the purchase price having been paid, as per your abstract for December, 1910, final certificate may now issue," etc. And since the Harry lode decision, even as late as January 8, 1913, the Department has granted to appellee additional final certificates of entry for placer claims situated in northern Utah, located upon the calcium phosphate deposit. The Harry lode decision in no way binds

the appellee as to the claims here involved, and we think we can convince the Land Department that it should not be controlling for numerous cogent reasons, which it is unnecessary here to set forth. But whether such reasons are to prove sufficient or not, we claim the right under the law to present them to the Land Department, where the question is properly cognizable.

Counsel have cited in their brief, *Webb vs. American Asphaltum Co.*, 157 Fed., 203, and *San Francisco Chemical Co. vs. Duffield et al*, Fed.,, both decided by the Circuit Court of Appeals for the Eighth Circuit, and wherein that court does pass upon the character of the mineral deposit. The *Webb* case involved a deposit of gilsonite which appeared in a well defined fissure and which the court holds to be subject to lode location only. The question of the right of the court to classify the deposit was not raised or passed upon by the court and the case is therefore of no assistance in reaching a conclusion upon that point. It is the only decision in the books up to the time of its rendition wherein a court has attempted to classify the public lands and determine under what form of entry they should be disposed of by the government. The other case cited is similar to the case at bar and is really the first adjudication upon the question now being discussed. The court relies upon the *Webb* case as authority and says:

“That case is directly applicable here, and we see no reason why, when Congress required that the adverse claimant, to maintain his claim, must invoke the aid of a court of competent jurisdiction

to determine the superior right as between the parties, it can be successfully said that the court, in making such inquiry, is prohibited from determining whether the land is subject to location in the mode and manner claimed by one or both of the parties.

“So, we think that, in determining the rights of the parties in these cases, our decision must rest upon the question as to whether the mineral land in controversy was of a character which entitled it to be located as a placer mine or whether it could only be entered as a lode mining claim. What may be the binding force and effect of the judgment in this case, in that respect, upon the Land Department, we are not called upon to decide.”

The reasoning of the court is not only unsound, but is opposed to the principles announced by the Supreme Court as well as the Land Department in the *Clipper Mining Company* case, *supra*. If the court determines the “mode and manner” of location to which the land is subject, is it not determining the character of the land? Is there not just as much distinction to be made and observed in the form of grant between lands which are lode in character and lands which are placer in character, as between lands which are agricultural and lands which are placer? As stated by Judge Van Fleet:

“The question as to the real character of the land sought to be purchased is no different in principle where it arises as between an agricultural claimant on the one side and a mineral claimant on the other, than where it arises between two

mineral claimants differing only in their claim as to which class of mineral lands, lode or placer, it is to be assigned. It is no more a question of law or less one of fact in the one instance than it is in the other."

It will also be noticed that the Circuit Court of Appeals for the Eighth Circuit states that while it must rest its decision "upon the question as to whether the mineral land in controversy was of a character which entitled it to be located as a placer mine or whether it could only be entered as a lode mining claim," it declines to decide what may be the binding effect of its judgment upon the Land Department. It would seem that a court should not undertake to deny to the prior locator who has complied with all requirements of the law, the right of possession of its claims by rendering a judgment which the court itself is not willing to assert may not be ignored by the Land Department. Based solely upon the character of the land, which basis the court will not say may not be destroyed by a departmental determination, it nevertheless prefers to deny the claim of the prior locator rather than to give it right of possession upon the basis of the stipulation as to its priority and compliance with the law and leave to the Land Department the determination of a question which has always been within its sole jurisdiction since its organization. Did not the Land Department in the Alice Placer decision, 4 L. Dec., 314; in Henderson vs. Fulton, 35 L. Dec., 652; in Utah Onyx Dev. Co., 38 L. Dec., 504; in its ruling upon the "Windward" placer and Harry lode applications, and in

innumerable other decisions, determine the character of the land, that is, whether it was lode or placer, so that it might say how and under what form of entry the government should part with its title? It having always been the conceded right of the Land Department to exercise sole jurisdiction in determining the question of the character and classification of the public lands not only when there was no adverse suit with respect to the claims passed upon, but likewise when the courts had already passed upon the right of possession (*Clipper Mining Co. case*, 194 U. S., 221; 48 L. Ed., 944; 33 L. Dec., 660, 667; 30 L. Dec., 401), what can justify the court now in interposing to determine it? We again insist that the court should award possession to him who, whether a lode or a placer claimant, was first in time and has complied with the law in establishing and maintaining his locations, and that under the stipulated facts in this case the decree of the District Court was clearly right and should be affirmed.

LODE VS. PLACER.

Because of the position taken by appellants on this appeal, we are, in the exercise of proper precaution, obliged to enter upon the discussion of the question of the character of the land covered by the mining claims in question, notwithstanding our firm conviction that it is not one with which the court is in anywise concerned. If, however, the court should determine to pass upon the character of the premises in controversy, we contend that placer and not lode is the

proper form of location to acquire title to the deposit of calcium phosphate.

Complainants allege in their amended bill of complaint, in substance and effect, that the mineral deposit sought by the respective parties is "a vein or lode of mineral bearing rock in place, containing phosphorite and valuable only for the said mineral contents thereof." Defendant in its answer denies this allegation and alleges to the contrary that "there is no mineral found within the limits of said placer mining claims, or any or either of them in the form of a vein or lode, or that is subject to location and acquisition under the laws of the United States by virtue of lode location."

Section 2320, Revised Statutes of the United States, among other things authorizes lode locations upon "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." And Section 2329, Revised Statutes of United States, provides for placer locations upon all forms of deposit, excepting veins of quartz, or other rock in place."

Is the deposit in question, which is properly designated as calcium phosphate, a vein or lode? We must inquire into its nature, form, manner of occurrence, and other characteristics in order to correctly answer this question.

NATURE OF THE DEPOSIT.

The best statement concerning the origin of this deposit and the best description thereof, is found in

the testimony of Mr. Weeks, who, as shown by the record, has had a very wide experience as a geologist and mining engineer, and who has made a more extensive and thorough investigation of rock phosphate than any other man whose testimony appears in the record, and undoubtedly as extensive an investigation both in the service of the Geological Survey and after he left that service as any man in the United States. According to his testimony, this phosphate rock is a part of a series of sedimentary deposits that are several thousand feet in thickness. The lowest bed of the series is a silicious limestone such as is found on the bed of the ocean. Upon this limestone was deposited the lowest bed of calcium phosphate, which is dark brown, or almost black in color, and which upon the claims in question is about five feet in thickness. Immediately above this bed of calcium phosphate is a layer of fossiliferous limestone, and above that alternating layers of calcium phosphate shale and limestone. The whole phosphate series from the underlying to the uppermost layer thereof—which latter is a bed of cherty limestone—is from sixty to two hundred feet in width, or thickness, the thickness varying in different localities. (Rec., 520, 521). The conclusion of geologists, accepted by all who have studied these deposits, and which from investigation has been demonstrated beyond question to be correct, is that the calcium phosphate is oolitic in character, that is, it is composed of oolites made up of a combination of calcium and phosphoric acid. These oolites or grains, assumed their form by the action of water in the same manner

that the sand oolites of the ocean beach are formed, and the hardened mass of calcium phosphate in its oolitic character resembles sandstone. It is agreed among men of science that the sedimentation occurred in water; that the phosphatic materials and soluble phosphates were washed down from the land areas surrounding the comparatively shallow sea wherein this bed was formed, and together with the phosphatic materials and soluble phosphates which were derived from the vegetable, animal and fish remains within the sea itself, were concentrated and by a washing process, or wave action, formed into oolites; that by a constant receding of the waters of the sea these oolites were, during the course of ages, gradually deposited as one bed, occupying a horizontal position, and these oolites, some in perfect form, others in a broken condition by reason of having been washed about, were in the process of sedimentation, cemented together by the deposition of calcium from the water, the cementation taking place after the oolites had found a resting place and were no longer disturbed by the movement of the waters; that by the process of cementation the oolites became a mass which solidified and became what is known as rock phosphate.

We have remarked that it has been demonstrated that the conclusion of geologists that this deposit was laid down in water, or is of marine origin, is correct, and the conditions which bear out this conclusion are, substantially, that not only is the phosphate rock itself composed of oolites which from present knowledge are produced only by the action of water, but there is found

in both the underlying bed of calcium carbonate, particularly in the bed of limestone immediately overlying the lowest bed of calcium phosphate, and also throughout the phosphate beds and the shales of the series, fossilized shells which are known to be marine shells. These fossils are not merely of occasional occurrence, but they are found in abundance, their nature and origin being learnedly discussed in a pamphlet by Dr. Girty of the Geological Survey. The reason for the conclusion that these deposits are of marine origin is very clearly stated by Mr. Bell, a witness for the appellee. He was asked by counsel for appellants if his conclusion "was not a mere theory," and replied:

"Well, it is more than a theory. If I can see a shell on the surface of the earth with a snail in it of a definite form, and I can go on to the sea shore and I can see another shell with an animal body in it like a mussel or clam alive, and see it move and breathe, I know that it exists. If I go into solid rock and see the fossil remains of a shell in just as perfect detail as the one that is alive today, I am positive in my own mind that it existed; that it lived and had a body and breathed and existed under the conditions of the one that I see before my eyes." (Rec., 824).

EXTENT OF DEPOSIT.

Recurring again to the evidence of Mr. Weeks, we are informed as to the extent of the western rock phosphate deposit. Defendant's Exhibit 1 was offered in

evidence for the purpose of illustrating this feature of the inquiry, and it shows that the deposit forms a part of the earth's stratification throughout an area of approximately 500 miles east and west, and 300 north and south throughout the States of Nevada, Utah, Wyoming, Idaho and Montana. (Rec., 559, 560). In addition to the area visited and examined by Mr. Weeks, the testimony of Mr. Breger (Rec., 665-671), confirms the statement of Mr. Weeks as to the great extent of this vast bed—only comparatively few outcroppings of which occur—and which, beyond question, underlies the surface of the hundreds of square miles of area described by Mr. Weeks and Mr. Breger.

MANNER OF OCCURRENCE OF DEPOSIT.

According to all of the geologists who testified in this case, this calcium phosphate deposit, in its solidified form, was by some mighty internal force lifted from its horizontal position and made to conform to the convolutions of the earth's surface. At various places on the crest of the upheaval it came to, or very near, the surface and has since been subjected to the process of erosion by the rains and snows of the centuries until from an examination of the vast area wherein this deposit is found, there are varying conditions with respect to its manner of occurrence. In some localities, for example, in the Sublette Range near Cokeville, the deposit occurs on a dip of about 65 degrees, while at other places, such as at Montpelier and Georgetown, the dip of the bed is in some places about 12 or 15 degrees only. In places the erosion has been

so great following the dip of the bed as to entirely remove all of the stratification, including the phosphate series, down to the underlying bed of calcium carbonate, which is clearly exposed. This occurs particularly in gulches, at the bottom and upon the sides of which, the underlying bed of limestone has been laid bare, while proceeding up the side of the gulch one will find immediately above this underlying bed of limestone, the lowest bed of the phosphate series, and farther up the hill the other strata of the series and also the cap line, except in places where some of the upper strata have also been eroded, and there has been left immediately upon the top of the underlying bed of phosphate rock itself, detrital materials deposited as wash from the higher ground. By reason of this erosion the line of the outcrop or highest point of exposure of the valuable underlying bed of calcium phosphate is very irregular, it being well illustrated by the black line on Defendant's Exhibit 2. The line of outcrop is highest on top of ridges and descends as erosion caused exposure on the sides of the gulches; the bed, however, always dipping to the west on the claims in question. The black line simply indicates the line of the bed as it is shown in its irregularity produced by the folding of the earth and by erosion. Exposures also occur in the creek channel of Montpelier Canyon, where the bed has been cross-cut and eroded away by the waters of Montpelier Creek. On the east side of the creek the bed is shown as it appears on its dip westerly from the black line running through the Arkansas claim (see Defendant's Exhibit 2), and on the west side of the creek in line

with the dip on the east side, the bed is seen as it continues downward toward the Bear Lake Valley. The strike of the bed is north and south and may be followed for several miles by the surface exposures and by the workings of those who have had and now have claims along it.

Each bed of the phosphate series maintains its individuality throughout, that is, the beds of calcium phosphate, fossiliferous limestone, shale and cherty limestone do not intrude one upon another. Each is distinct and never, throughout any of the workings, has it been discovered that one stratum has been substituted for or has taken the place of another either in whole or in part. (Rec., 566, 567, 746). Neither has it been shown upon any of the workings that any stratum pinched out. (Rec., 746). By an examination of the underlying bed of calcium carbonate, and of the fossiliferous limestone immediately above the valuable bed of calcium phosphate, one may see seams or cleavage planes in the rock, but in none of these planes or cracks has any of the calcium phosphate intruded; and even where the strata above the valuable bed are comparatively thin, they show no evidence of ever having been disturbed by the layer or stratum immediately above or below.

The phosphate rock may be, and has been mined by different methods. In some localities it is necessary to mine it in the same manner that coal is mined, while in other localities, such as at Sage, Wyoming, and at Montpelier, it could only be mined by quarrying. (Rec., 458-460, 746).

THE USE OF PHOSPHATE ROCK.

Calcium phosphate is used as a fertilizer and for no other purpose. (Rec., 342, 545). Only the lower bed of the phosphate series is of any commercial value (Rec., 738, 739), and it is upon this that all the discoveries of both complainants and defendant were made. This bed is composed of about seventy per cent calcium phosphate; that is, seventy per cent of a combination of calcium and phosphoric acid. The manner of its preparation for market is explained by Mr. Weeks at pages 545 and 546 of the record, and in succeeding pages he explains how the prepared product is used and also its chemical and mechanical effect upon the soil. It is not mined, as is contended by some of the witnesses for the complainants, for the phosphorus it contains; neither is it used for the phosphorous content. The rock is valuable because it is a combination of phosphoric acid with calcium. (Rec., 545). It would be impracticable to provide phosphoric acid as a fertilizer unless in combination with the calcium (Rec., 547), and both of these constituents of the rock are highly valuable, the phosphoric acid as food for the growing plant, and the calcium to a limited extent also as a plant food, but primarily valuable as a sweetener of the soil in the same manner that gypsum or land plaster is a soil sweetener, or as common lime is valuable for the same purpose. (Rec., 549, 550). As explained by Mr. Weeks, who, by the way, is a chemist, and also a practical farmer, who has purchased and used phosphate rock both in the prepared and unprepared state (Rec., 544, 548, 549, 550), it is a question

of the condition of the soil as to whether the prepared product or the raw phosphate rock itself is the more valuable for fertilizing purposes. (Rec., 549, 550, 551). If the humus has been removed from the soil the prepared product is preferable. If, however, the land possesses considerable humus, the raw phosphate rock is more effective. However, whether used in the raw or in the prepared state, it is mined as a whole and is used as a whole, and is not subject to any process whereby any mineral contained in the rock is extracted. (Rec., 548, 551). The deposit, so far as it has any value, is, in the words of Mr. Bell, "simply a consolidated natural manure, and its chief use in commerce would be for that purpose, for fertilizing land." (Rec., 780).

SECTIONS 2320, AND 2329, R. S. U. S.

There can be no doubt that the ground in question is mineral land within the purview of the laws of the United States. (Northern Pac. R. R. Co. vs. Soderberg, 188 U. S., p. 524; 47 L. Ed., p. 575). Phosphate land has been so declared by the Department of the Interior, 18 L. D., 58; 26 L. D., 600; but in view of the origin, ~~properties~~ ~~proportion~~, manner of occurrence, method of mining and use of this deposit, can it be said that it should be located as a vein or lode? Our construction of Section 2320, Revised Statutes of the United States, which is, we think, the only construction that is reasonable and consistent with the history of mining, is that before a deposit is subject to lode location it must be

a "vein" or "lode," and these words being used synonymously, we say that in short the deposit must be a "vein." The words of the statute are "vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." There is no comma after the word "quartz;" the statute, therefore, does not mean that not only may veins or lodes of quartz be located as lodes, but also other rock in place not a vein or lode, but it means that veins or lodes of quartz bearing the enumerated metals, or other valuable deposits, may be located as lodes, and also that "*veins*" or "*lodes*" of other rock in place, bearing said metals and other valuable deposits are subject to lode locations. To make ourselves clear, we contend that to be locatable as a lode, the deposit must be a vein or lode of quartz or a vein or lode of other rock (not quartz) in place, bearing gold, etc. "All forms of deposit excepting veins of quartz or other rock in place" are patentable as placer and rock in place when not a *vein* has been repeatedly declared to be subject to placer entry, as appears from the rulings of the Land Department, of which the following are a very few:

In *Collins vs. Kelly*, 12 L. Dec., 1, the Secretary of the Interior suggested that limestone used for making lime would be properly located as placer, and this suggestion was followed in *Shepherd vs. Bird*, 17 L. Dec., 82, where the question as to how such a deposit might be acquired was raised.

In *Henderson vs. Fulton*, 35 L. Dec., 632, it was held that marble is subject to location as placer and

not as lode. We shall have occasion to again refer to this decision.

In *McGlenn vs. Weinbroeer*, 15 L. Dec., 370, it was held that building stone was locatable as placer; and this decision was rendered without applying the law of 1892, which expressly authorized a placer entry of such deposits, the right to the ground, having initiated prior to the passage of that law. See also 3 L. Dec., 116.

Gypsum, also, is subject to placer location (*Morrison on Mining Rights*, p. 243, 244; *Shamel on Mining Law*, p. 277), and the same is true of phosphate rock itself. (Defendant's Exhibit X; 18 L. Dec., 58).

The foregoing decisions are cited for the purpose of justifying our construction of the statute that it is not enough that the deposit be "rock in place" to exclude it from location as placer under Section 2329, or to warrant its location as lode under Section 2320. These adjudications in effect hold that where there is no vein and the "rock in place" is a valuable mineral deposit, it is subject to location as placer. (3 L. Dec., 116).

The idea which we have above expressed with reference to the construction of Sections 2320 and 2329 is sustained by *Lindley on Mining Law*, Vol. 1, Sec. 299, wherein he states:

"A vein, or lode, is necessarily 'in place.' The condition of being 'in place' is one of its essential attributes. The term 'quartz or other rock in place,' as used in section twenty-three hundred and twenty of the Revised Statutes, refers to its con-

stituent elements, or the 'filling' of veins and lodes. Experience has shown that mineral substances in veins, or lodes, are not always found in quartz. Sometimes the vein material is composed mainly of the same character of rock as the inclosing walls—the occurrence of mineral being in the form of impregnations, penetrating the country rock, or the mineral may be but a replacement of the original rocks. So the statute recognizing that while the material of most veins consists of quartz, yet, as this is not universally true, the alternative, 'or other rock in place,' was introduced. As quartz is a vein in rock in place, the statute would have been equally as comprehensive if instead of saying 'veins, or lodes of quartz or other rock in place' it had simply said 'veins, or lodes, of rock in place.' ”

And the court in *Webb vs. Asphaltum Mining Company*, 157 Fed., 203, makes the following declaration:

“The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a *vein* or *lode* in rock in place it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a *vein* or *lode* in rock in place it may be secured by a placer claim, and may not be by a lode claim.”

THE DEPOSIT IN QUESTION NOT A VEIN.

What is a vein? There are various definitions of

rock; they are one and the same. The deposit is simply an aggregation of oolites (see Defendant's Exhibits 10 and 11), cemented together by calcium. The calcium itself in such combination is an essential element in making the deposit valuable, possessing as it does, properties which render the whole rock mass effective for fertilizing purposes.

*THE PHOSPHATE DEPOSIT DOES NOT BEAR
OR CONTAIN ANY OF THE METALS OR
SUBSTANCES ENUMERATED IN
SECTION 2320.*

Excepting the cases of *Webb vs. Asphaltum Co.*, supra, and *San Francisco Chemical Co. vs. Duffield*,Fed.,, both decided by the Circuit Court of Appeals for the Eighth Circuit, there is no adjudication that a deposit of a non-metallic mineral is subject to location as a lode; and as shown by the cases of *Iron Silver Mining Co. vs. Mike & Starr Mining Co.*, 143 U. S., 394; 36 L. Ed., 201, 210, and *United States vs. Iron Silver Mining Co.*, 128 U. S., 673; 32 L. Ed., 571, the Supreme Court of the United States has declared that there cannot be a lode location "until the discovery of a lode or vein bearing *metal*," and that by the words "veins" or "lodes" "are meant aggregations of *metal* imbedded in quartz or other rock in place," hence we say that one of the characteristics of a vein or lode is that it contains a metallic mineral. Under the construction of the statute as announced in the *Webb* case, the fact that calcium phosphate is a non-metallic mineral, is not, of itself, important in deter-

thing. Such a piece of broken oolite forms the center or nucleus of the subsequent oolite which is formed, which you will find forming these concentric forms or layers. So that the study of these oolites indicates from their structure and from the material of which they are made, that they are formed upon the ocean bottom, in which the water must have been comparatively quiet; nevertheless, there was sufficient movement of the water, or currents, to move these oolites along, to abrade them, and in that movement they were gathering from the surface underneath the water, or from material in suspension in the water, the materials which formed the oolites. They were the first things that were formed in this phosphate rock. The cementing material, which is the calcium carbonate, was probably laid down in a form just about the same time that the oolites were formed, or immediately thereafter, and the whole mass of the phosphate rock is made up of these oolites, and of the calcium carbonate cement, which binds the oolites together into a rock stratum." (Rec., 521-523).

It cannot be said that this deposit is mineralized rock. "Two distinct constituent elements of vein matter or substance are clearly recognized as essential; the *rock* and the *mineral borne in the rock*." (Henderson vs. Fulton, 35 L. Dec., 652, 662). What rock have we here which bears a mineral? None; but we have a combination of calcium and phosphoric acid which is not only the rock but the mineral as well. There is no rock bearing any mineral and no mineral borne in any

eral of some kind or other, but it is not necessarily mineralized rock." (Rec., 594).

These definitions accord with that of Webster, that mineralized rock is "rock impregnated with mineral."

The manner of its deposition as stated by Mr. Weeks, and which statement is confirmed by Mr. Breger and Mr. Bell, precludes the classification of this deposit as either *mineralized* or *mineral-bearing rock*.

To quote further from Mr. Weeks:

"When you examine the phosphate rock in a hand specimen, the first examination one makes of its granular character it seems to be made up of grains, which are these little oolites; and if you take a piece of this phosphate rock and grind it down until it is very thin and spread it out upon a sheet of glass, and grind it so that you get cross sections of these oolites, so you can observe through the microscope the internal structure of these oolites, you will find that they are made up of concentric layers of I might call them concretions; they are layers of material, one layer upon another, of course exceedingly thin, and you will find in the center of these oolites, frequently, a small particle of calcite,—which is shown by the striations of the calcite material,—forming the nucleus around which these materials have accumulated forming the oolite; or you will find in the center of an oolite another oolite, which shows under the microscope to have been broken in two, and its edges made rough, as if it had been rolled around upon some

a more or less economical extent from such molten magma.

Q. Is this calcium phosphate a mineral-bearing or mineralized rock?

A. Decidedly no.

Q. Now, in mineralized rock, or mineral-bearing rock, what is the distinction which exists between such rock and this calcium phosphate?

A. In mineralized and mineral-bearing rock the distinction, perhaps the principal distinction, as I have indicated, is, that to have mineralized rock the country rock must be in existence—must have been in existence as such prior to the mineralization, and the mineralized or valuable mineral deposits must have been thereafter brought into their present position, and from without the limits of their present occurrence. These are perhaps the principal distinctions. The phosphate rock was an original sedimentary deposit; it was deposited along with the other strata, below it and above it, to the extent of all the present valuable mineral deposits it bears, and there has been no mineralization or deposition of valuable mineral deposits therein after these rocks have become rock in place. (Rec., pp. 685, 686).

Mr. Weeks stated on cross-examination:

“My conception of mineralized rock is a rock into which mineral has come in some form after the formation of the rock itself. All rock is min-

A. Mineralized or mineral-bearing rock is rock in which mineralization has taken place.

Q. Explain in what manner mineralization takes place to constitute the mineralized rock?

A. To constitute the mineralized rock it is necessary to have the rock in place originally, before mineralization takes place. That is necessary to begin with. Thereupon mineralization of the rock may take place by various methods, chief among which are the following: Fissure veins, or vein deposits of a general type of fissure veins, which mineralizations take place in crevices, fissures, or other cavities in such rock, by injection from without of valuable or other materials, usually carried in aqueous solution into such fissures, crevices or cavities. There are also replacement mineralizations, wherein the mineral-bearing solutions, or other mineral carriers, are deposited between the grains of rock in place, and such deposits are usually associated with the replacement of the constituent grains of the rock, to a greater or less extent, by the valuable minerals or mineral-bearing deposits in question. Such deposits are known as replacement deposits, as distinct from fissure-vein deposits. There is a third class of deposits, which hardly enters into the present discussion, and is known as magmatic segregations. Such deposits are confined entirely to granite and gneisses and original archaean or primitive rocks which have been molten, and mineral depositions separating out to

A. That is classed as generally true, but often a fissure is formed by chemical action of metals in the form of salts, or acids, etc., being in the water and eating away the walls and making deposits in the cavity that has been eaten away.

Q. But, nevertheless, the substance for which the miner is seeking, and which constitutes the valuable property, comes into the fissure after it is created, whether it is created by this eating away, or whether by some internal force that parts the rock?

A. Yes, sir; it is a concentration in the crevice.

Q. Yes, in the crevice. Now, is there any crevice in this calcium phosphate deposit?

A. No; I have said it was a sedimentary deposit. (Rec., 364).

Mr. Wilson, another witness for the appellees, referring to the phosphate deposit, has this to say:

Q. Is it your interpretation of a fissure—so that I can get your idea of a fissure—as a mining engineer, do you contend that the space between what you call hanging and foot walls is a fissure?

Q. No, sir. (Rec., 448).

(See also testimony of Mr. Weeks, Tr., p. 234.)

THERE IS NO MINERALIZED OR MINERAL BEARING ROCK.

Mr. Breger testified as follows:

Q. What definition do you give, Mr. Breger, of mineralized or mineral-bearing rock?

How many of these characteristics are possessed by this deposit of calcium phosphate?

We concede that it is rock in place having a dip and a strike in the same sense as limestone, gypsum, building stone, coal or any other rock formation which forms a part of, and is firmly fixed in, the mass of the hill, and that it usually occurs between a bed of overlying fossiliferous limestone, and an underlying bed of hard silicious limestone. This latter feature of the deposit, however, is not always present, for in some places it has no overlying rock, the same having been eroded and replaced by detrital materials washed from the hill above. In such localities the deposit occurs simply as a quarry and is and can be mined only by that method. Except in the particulars just mentioned it possesses none of the characteristics of a vein. We will now proceed to show from the evidence the many characteristics of a vein which this deposit does not possess.

*DEPOSIT NOT FOUND WITHIN A FISSURE OR
CREVICE.*

Mr. Sterling, a witness for the appellees, testifies concerning the formation of veins as follows:

Q. But always this ore, or mineral rather, whichever you may term it, comes into the fissure whether from above or below, or from the sides, after the formation of the fissure. That is the accepted idea among geologists?

the proper form of location for a non-metallic mineral not under consideration by the Supreme Court when it made use of the expression; and this principle holds good in answer to appellee's attempt to control the court in determining what is a lode by the general definitions of the Supreme Court in the Eureka and Cheesman cases.

It is apparent from the authorities heretofore cited that in addition to its having a dip and a strike, the following are the usual characteristics of a vein:

(a) A fissure, crack or crevice in the earth's crust.

(b) The crevice must contain mineralized or mineral-bearing rock.

(c) Mineralized rock must be in place, and must be valuable for the mineral content which it bears.

(d) The rock in place bears one or more of the metals named in the statute.

(e) Such mineralized rock has been forced by internal heat and pressure from the depths of the earth in the form of solutions and gases, and, following the line of least resistance, has found its way along the rift or crevice, and there in time become solidified.

(f) The mineralized substance is foreign to the rock into which it has been injected.

(g) If (as in bedded veins) no well defined fissure was created by the internal forces prior to the injection of the mineralized solutions, there has been a partial dissolution of some particular stratum by the solutions and gases, and in place of the rock dissolved has been left the foreign mineralized matter.

lines or aggregations of metal imbedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of *metal in rock*."

United States vs. Iron Silver Min. Co., 128
U. S., 673; 32 L. Ed., 571.

See also:

Bevis vs. Markland, 130 Fed., 226.

In the case of Webb vs. American Asphaltum Mining Company, 157 Fed., 203, the Circuit Court of Appeals for the Eighth Circuit, while holding that a deposit in order to be locatable as lode must be a *vein in rock in place*, seems to depart from the doctrine in the cases just cited that the deposit must be metalliferous, and holds that gilsonite *when appearing as a vein in rock in place*, though non-metallic, is subject to lode location. Of this decision Mr. Morrison in his work on Mining Rights, says: "It remains for the ultimate adjudication of the Federal Supreme Court before we can concede that it is a correct exposition of the law." Morrison (14th) Ed., p. 243. Assuming, however, that the Supreme Court would hold that a non-metallic mineral may be located as lode, the Webb case well illustrates the principle that general statements of the Supreme Court defining a vein or lode as *metal bearing* are to be considered in connection with the facts of the particular case before the court and not as controlling in a case wherein the court is called upon to determine

Reynolds vs. Iron Silver Mining Co., 116 U. S., 687; 29 L. Ed., 774, 777.

“With practical unanimity the authorities are to the effect that to constitute a vein or lode within the meaning of the statute, the mineral deposit must be borne in rock in place. *Mineral-bearing rock, in place*, or equivalent terms, are invariably used in defining what the law contemplates as a vein or lode. Quartz or other rock in place bearing gold, silver, etc., are the terms used in the statute. Two distinct constituent elements of vein matter or substance are clearly recognized as essential; the *rock*, and the *mineral* borne in the rock. To this extent, therefore, a general definition applicable to all cases may be given, namely: that a vein or lode to be locatable and patentable under the mining laws must possess the elements of rock in place bearing one or more of the minerals specified in the statute, or some other mineral that would be embraced within the words, ‘other valuable deposits.’ ”

Henderson vs. Fulton, 35 Land Dec., 652, 662.

“A right to a lode can only be initiated by location, and the statute declares that no location can be made until the discovery of *a lode or vein bearing metal.*”

Iron Silver Mining Co. vs. Mike & Starr Min. Co., 143 U. S., 394; 36 L. Ed., 201, 210.

“By ‘veins or lodes’ as here used, are meant

they be seen. Their existence may be determined by assay and analysis. *Id: Hyman vs. Wheeler* (C. C.), 29 Fed., 347; *Mining Company vs. Cheesman*, 116 U. S., 529, 6 Sup. Ct., 481, 28 L. Ed., 712. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place, in the mass of the surrounding formation. If it possesses these requisites and carry mineral in appreciable quantities, it is a mineral-bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained.”

Beals vs. Cone (Col.), 62 Pac., 948, 952, 953.

“The veins, lodes or fissures mentioned in Section 2320 are found in the surrounding rock, and are described and defined in the case of *Iron Silver Co. vs. Cheesman* (ante. 712), recently decided in this court. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth’s surface, and not among the rocks beneath. The one is only available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface and subjecting it to crushing, melting and other processes by which the precious metal is separated from the ore of which it is a part. In the other, the more usual way is to take the soft, earthy matter in which the particles of mineral are loosely mingled and by filtration separate the one from the other.”

Eureka case, 4 Saw., 302, and other decisions following and referring to that. In the Eureka case, Mr. Justice Field of the Supreme Court of the United States, said: 'We are of the opinion that the term (lode) as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, 'all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same process.' This definition would not include a bed of gravel from which particles of gold may be washed. The words 'mineralized rock' were evidently intended to qualify the last as well as the first sentence."

* * * * *

"In practical mining, the terms 'vein' or 'lode' applies to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense these terms were employed in the several Acts of Congress relating to mining locations."

Hayes vs. Laviguino (Utah), 33 Pac., 1029.

"The distinguishing feature between a vein and the formation enclosing it may be visible. It must have boundaries, but it is not necessary that

CENTURY DICTIONARY.

“*Lode*—A metalliferous deposit having more or less of a vein-like character—that is, having a certain degree of regularity, and being confined within walls. Lode as used by miners is nearly synonymous with the term vein as employed by geologists, etc. The word would not be used for a flat, stratified mass.”

CENTURY DICTIONARY.

“Veins are aggregations of mineral matter in fissures of rocks. Lodes are therefore aggregations of mineral matter containing ores in fissures.”

Von Cotta’s “Treatise on Ore Deposits,” Sec. 16 (Prime’s Translation).

“The word ‘lode’ is properly defined as a ‘zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock’ and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be enclosed within defined boundaries.”

Gregory vs. Pershbaker (Cal.), 14 Pac., 401.

The court in the last case cited discusses the definition of Justice Field in the Eureka case, and in passing upon the contention that the deposit was lode, uses the following language:

“In support of their view, counsel cited the

in fissures, of certain mineral matter, usually in a purer and more sparry form than they exist in the rocks. The accumulation has in all cases taken place subsequently to the formation of the fissure and by slow process.”

In *Con. Wyoming Gold Mining Company vs. Champion*, 63 Fed., pp. 544, 545, it is said:

“To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot walls.”

The following are other definitions:

“*Vein*—An occurrence of ore, usually disseminated through a gangue or veinstone, and having a more or less regular development in length, width and depth.”

* * * * *

“A vein and a lode are, in common usage, essentially the same thing, the former being rather the scientific, the latter the miner’s name for it.”

* * * * *

“A bed of rock forming a member of a stratified formation, with which it was synchronously deposited, cannot properly be called a vein or lode, even if it has metalliferous matter generally disseminated through it in quantity sufficient to be worth working.”

dition, must be metalliferous—must contain some kind of mineral of value so as to distinguish it from the country rock.

* * * * *

“The books tell us that vein-making fissures have been formed by contraction or drying, as in argillaceous stratum, or on cooling from fusion or from heat attending metamorphism; by subterranean movements, pre-eminently those which have attended mountain making; by the disruptive or expansive action of vapors resulting from volcanic action; and by corroding vapors, or by solutions from the deep, which sometimes enlarge the fissures, especially where the rock is limestone. (Dana, *Manual of Geology*). Fissures formed through volcanic action and enlarged by corroding solutions and vapors, are deep-seated, and frequently contain large cavities. That the vein in question was so formed by such action, and solutions or vapors appears from the testimony as we have already observed. It will be perceived that to define the word ‘vein,’ that represents a thing of so many and varied characteristics, is a matter attended with difficulty. Especially is this true if such definition, in view of the statutes which deal with mineral-bearing veins only, is to convey an accurate idea of the thing itself.”

La Conte in his “*Elements of Geology*,” page 234, says:

“True veins, then, are accumulations, mostly

“In determining the question before us, however, whether the finding of the court was warranted by the evidence, it is important to consider what constitutes a vein or lode. It will hardly be contended that merely because rock is broken, crushed, shattered or even fissured, it contains a vein within the meaning of the laws of Congress. All miners of any experience as well as men of scientific research, know that such occurrence may be found in the most barren country. Something more is necessary to dignify that kind of material with the character of a vein or lode.”

Grand Central Mining Co. vs. Mammoth Mining Co. (Utah), 83 Pac., 679.

This expression coincides with what we have heretofore stated, that it cannot be said that any given deposit is a vein or lode from the simple fact that it possesses any one, or even several, of the characteristics specified in certain definitions. As we have heretofore shown, the mere fact that it is rock in place is not sufficient to render it subject to lode location, nor is it sufficient, as stated above, to find broken, crushed, shattered or fissured rock. We must broaden our inquiry and ascertain whether the particular deposit in question before the court, possesses not merely one characteristic but all the characteristics which go to constitute it a vein or lode. The court in the above case continues:

“The material, whatever else may be its con-

Again, in speaking of mineral deposits in irregular forms (XCXX), it is said:

“It is certain that they were not deposited in the limestone bed when it was formed. On the contrary, they were deposited in their present position * * * long after the formation and consolidation of the limestone.”

Again (CX):

“Generally speaking, it would seem to the author that an ore body, to be regarded in the eye of the law as a ‘lode,’ and which will be given all the legal attributes which belong to true lodes, must not only possess reasonable continuity, but must in itself represent some well defined and reasonably regular main channel of mineralization, through which the hot water and vapors ascended, and in which or along which they deposited their mineral solutions. This is an almost infallible test.”

“A vein or lode authorized to be located is a seam or fissure in the earth’s crust filled with quartz or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute.”

Jupiter Mining Co. vs. Bodie Con. Mining Co.,
11 Fed., 675.

“What, then, is a quartz lode? It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver, etc.”

Foote vs. National Mining Co., 2 Mont., 402.

decided, but their possible bearing on all other cases is seldom completely investigated.”

It is quite apparent that the question as to whether this deposit of calcium phosphate is a “vein” or “lode” is not to be determined by arbitrarily including it within the broad definitions and general statements of the court in the Eureka case and the Cheesman case, as was done by the Circuit Court of Appeals for the Eighth Circuit in *San Francisco Chemical Co. vs. Duffield et al.*, Fed.,, for those definitions were not announced when the question of the classification of calcium phosphate or any similar deposit having a like origin, a like appearance, or a similar use, was under consideration. In order to properly classify this deposit we must ascertain what are the characteristics of lodes or veins as they are known to practical miners, and to the mining industry. Let us see what these characteristics are:

CHARACTERISTICS OF VEINS.

In the work entitled “The Law of Mines and Mining in the United States,” by Barringer and Adams, the following appears in the geological preface (XCIX):

“Generally speaking, a vein or lode represents some break or rift in the rocky crust of the earth, usually penetrating to a great depth, through which channel mineralized waters have ascended, and in which, on the sides of which, or in the rocks adjacent to which, they have deposited their mineral solutions until these have slowly filled and choked up the crevice.”

The term is not susceptible of arbitrary definition applicable to every case. It must be controlled in a measure, at least, by the conditions of locality and deposit. *Cheesman vs. Shreeve*, 40 Fed., 878.”

Beals vs. Cone (Col.), 62 Pac., 948, 952, 943.

The Interior Department, also, has said:

“That it has been difficult, if not impracticable, to give any broad and general definition controlling as to all features and in all cases is beyond doubt.
* * * The authorities recognize that definitions have been given in some of the states and mining districts that would not be applicable to conditions in other states and mining districts.”

Henderson vs. Fulton, 35 L. Dec., 652, 663.

In *Cohens vs. Virginia*, 6 Wheaton, 262; 5 L. Ed., 257, 290, Chief Justice Marshall said:

“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case

Mr. Justice Field himself, clearly recognized the principle which should control in reaching a conclusion in this case. To quote:

“It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.”

Barden vs. Northern Pac. R. R. Co., 154 U. S., 322; 38 L. Ed., 1000.

In Book vs. Justice Mining Co., 58 Fed., 121, it is said:

“The definitions of a vein or lode, as given in the authorities, are, as before stated, instructive, and worthy of consideration. *Their application to any given case must be determined by reference to the special facts which existed in the particular mining district where the lodes under consideration were located, in connection with the facts of the case before the court.*”

As stated in the Eureka case.

“It is difficult to give any definition of this term (vein) as understood and used in the Acts of Congress which will not be subject to criticism.”

And the Supreme Court of Colorado has said:

“Many definitions of veins have been given, varying according to the facts under consideration.

Now it was under the conditions above detailed that the foregoing definitions were announced. In both cases the deposits, without question, possessed the characteristics of veins; that is, they were deposits of *mineral bearing* rock lying within crevices, fissures or fractures made by the forces of nature into which this mineral bearing rock had been injected, and the only question determined in the Eureka case was whether one or more lodes or veins existed within the zone in controversy, and in the case of Iron Silver Mining Company vs. Cheesman, as to whether the lode or vein claimed by the defendant was a part of the lode or vein claimed by the plaintiff.

Under these conditions, it cannot, of course, be reasonably contended that the court intended to decide that every valuable deposit of mineral within well defined walls, is a lode or vein. It was not necessary for the court to render such a decision. This is clear from the following statement of the trial court in the Cheesman case, 8 Fed., 301:

“The words used in the statute to designate mineral deposit in rock in place are ‘vein,’ ‘lode,’ and ‘ledge,’ and these are supposed to be nearly synonymous in meaning. However these words may differ in meaning, it is not important in this case to look for a distinction between them. *Nor is it important to define their meaning in a manner that may be accepted in all cases. Any effort so to define them would probably result in a failure; but we must seek for a meaning which will enable us to reach a conclusion in this case.*”

bear in mind the circumstances under which these expressions were used, that is, the facts and conditions presented for the court's consideration. No definition should be accepted as a precedent unless the court believes that it was intended to apply to conditions presented in the case under consideration. In the Eureka case the question was not whether the deposit was lode or placer, but whether in its formation and manner of occurrence the deposit consisted of one or several lodes. The court found the formation to be a limestone which by the forces of nature had been broken and crushed, and wherein existed fissures, crevices and chambers into which had been injected in solution the metal bearing rock.

In the case of Iron Silver Mining Company vs. Cheesman, *supra*, the question of lode against placer was not in issue, but the observations of the court were made in connection with a determination of the question as to whether a certain deposit claimed by the defendant as the "Smuggler Lode" apexed in and was a part of the plaintiff's "Lime Lode." This question had been submitted to the jury, which had rendered a verdict in favor of the defendant upon the theory that the ground was so broken and disjointed and the several parts so intermingled that the "Smuggler Lode" was not a part of the "Lime Lode." The trial court in its instructions recognized the existence of the fissures and crevices, and the jury determined simply that the fissure and crevice claimed by the plaintiff was not continuous to the extent of taking on its dip the deposit of the defendant.

tial to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found throughout a mineralized zone or belt coming from the same source, impressed with the same forms and appearing to have been created by the same processes."

In *Iron Silver Mining Company vs. Cheesman*, 116 U. S., 529; 29 L. Ed., 712, this definition is quoted with approval, as is also the statement of Judge Hallett in *Stevens vs. Williams*, 1 McCrary, 488, to-wit: "In general it may be said that a lode or vein is a body of mineral or a mineral body of rock within defined boundaries in the general mass of the mountain."

The definitions above given are quoted and relied upon by complainants, and they claim that the deposit of calcium phosphate in question comes within their terms as a body of mineralized rock within defined boundaries in the general mass of the mountain. In considering these definitions, however, the court will

the word as used in the mining law. In the Eureka case, 4 Sawyer, 302, Justice Field states :

“The Act of Congress, 1866, provided for the acquisition of a patent by any person or association of persons claiming a vein or lode of quartz or rock in place bearing gold, silver, cinnabar or copper.”

“The Act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the terms should, therefore, be sufficiently broad to embrace deposits of the several metals or ores herein mentioned. In the construction of the statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is that of a fissure in the earth’s crust filled with mineral matter, or more accurately, as aggregations of mineral matter containing ores in fissures. (See Von Cotta’s “Treatise on Ore Deposits,” Prime’s Translation, 26). But miners used the term before geologists attempted to give it a definition.”

After quoting some of the testimony, Justice Field proceeds :

“It is difficult to give any definition of the term, as understood and used in the Acts of Congress, which will not be subject to criticism. A fissure in the earth’s crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essen-

mining how it should be located. The real question is whether the mineral, whatever it may be, is in the form of a vein in rock in place, as was the case with the gilsonite deposit. However, since we are pointing out the characteristics of veins which are not possessed by the calcium phosphate deposit, we call attention to the testimony to show that it is different from a lode formation as the Supreme Court defines it, in that the mineral is non-metallic.

Mr. Wilson, a witness for appellees, testified:

Q. Now, Mr. Wilson, you say that the mineral has the usual form of mineral-within this deposit?

A. Yes, sir.

Q. That is what is known, is it not, as a non-metallic mineral?

A. A non-metallic mineral, yes. (Rec., 435).
There is in the evidence no dispute upon this point.

THE DEPOSIT IS NOT A SUBSTANCE WHICH HAS BEEN FORCED BY INTERNAL HEAT AND PRESSURE FROM THE DEPTHS OF THE EARTH IN THE FORM OF SOLUTIONS AND CASES, AND WHICH, FOLLOWING THE LINE OF LEAST RESISTANCE, HAS FOUND ITS WAY INTO A RIFT OR CREVICE IN THE EARTH'S CRUST AND THEREAFTER BE COME SOLIDIFIED.

This proposition needs no discussion because all the geologists admit that the deposit is sedimentary and was laid down in water in a horizontal position.

*THE BED OF CALCIUM PHOSPHATE WAS NOT
FORMED BY A PROCESS OF REPLACEMENT AS IS THE CASE WITH
BEDDED VEINS.*

Mr. Sterling, in his testimony, suggests that the deposit might have been formed by the phosphate materials replacing a bed of limestone. This suggestion finds no support when the deposit is examined. Where replacement has taken place there are always portions of the replaced stratum which have not been dissolved away. For example, where lead deposits are found as bedded veins, the solution has disintegrated a portion of the limestone bed, but other portions of that bed were not dissolved but remain in their original position, the solutions having eaten out and filled an irregular channel along the bed. In this deposit of rock phosphate no other rock or deposit is found. No portions of a dissimilar rock exist. The calcium phosphate itself occupies the whole plane and is in itself the original stratum. (Rec., 566, 820, 823). As stated by Mr. Weeks:

“There is no evidence—no indication at any of the many points that I have examined this phosphate bed, of a replacement process. * * * In this bed of phosphate we find no particles of limestone or particles of other substances that might have been—some parts of them—replaced. The bed itself is everywhere composed of these grains, or oolites, and the material which cements them together, and we never find anything else in it.” (Rec., 566).

At this point we call to mind that appellants, in their brief, set forth a quotation from Lindley and cited the case of *Jones vs. Prospect Mining Co. (Nev.)*, 31 Pac., 642, to the effect that it is "utterly impracticable and useless to attempt to draw a distinction based upon the mode or manner or time" of the deposition of a mineral deposit, as it is "but little more than a matter of mere speculation." Such is not the condition with respect to calcium phosphate, for it is agreed by the witnesses of both parties that this deposit is sedimentary; that it was laid down in water and that it is a stratum of the Carboniferous Age, so the element of speculation is not present in this case. Furthermore, notwithstanding the expression of these authorities, we contend that it would be utterly impossible for the court to intelligently classify this deposit without an understanding of its origin, nature and use as well as the present manner of occurrence thereof. Should the court simply say it is "rock in place" and therefore lode? As we have shown, such a premise would not justify the conclusion. It must ascertain whether the deposit is a *vein in rock in place* and this question can only be determined by comparing the deposit with veins as they have been defined by the courts.

*PHOSPHATE ROCK NOT VALUABLE FOR ANY
PARTICULAR MINERAL CONTENT, BUT
ONLY AS A WHOLE.*

Mr. Guy Sterling, the chief witness for the appellants, represented himself as an expert on calcium phosphate, and testified that it is used as a fertilizer

and is commercially valuable for that purpose only (Rec., 342), though as to the rock phosphate in controversy he did not know where it was shipped, or what it was used for (Rec., 341); that he had never sold or bought a pound of it (Rec., 405). According to Mr. Sterling, the calcium phosphate deposit is not a placer because it is mined for its mineral content, phosphorus, and is not mined and used as a whole as is gypsum, limestone, building stone, cement, etc. (Rec., 346-351) Let us see how he sustains this assertion:

Q. Now isn't it true that it is not mined for that at all, but for the combination of the calcium and phosphoric acid?

A. No, the essential value of the rock is due to its phosphorous contents.

Q. And not for its phosphoric contents in connection or in combination with calcium?

A. No; if you had a pure bed of phosphorus ---well, I will put it another way---if it was possible to get phosphorus by itself, it would be very easy to get the lime and other things to mix with this.

Q. That is true, but isn't it true that it is valuable because of the calcium that is now in combination with the phosphoric acid?

A. I don't think so.

Q. Now, is there a particle of phosphorus in this rock?

A. I don't say that there is---there is phosphorus in it, but not in the uncombined form.

Q. They don't mine it in order to get out any phosphorus in the uncombined form?

A. Not for fertilizing, but they do when they want phosphorus.

Q. I am asking about the fertilizers, that is what it is mined for.

A. Not exclusively.

Q. Out of these beds?

A. It may be now, but that does not apply to the future.

Q. There is not any phosphorus in it?

A. Not uncombined.

Q. And they don't mine it for phosphorus?

A. They do not now, but they may mine phosphate rock for phosphorus.

Q. They do not, and you don't know of any institution, or place where phosphate rock, this phosphate rock in this deposit that we are speaking of, this phosphate rock is treated to extract the phosphorus?

A. You are referring now directly and exclusively to this?

Q. I am referring,—

A. The claims shown on Exhibit No. 1?

Q. Yes.

A. I don't know where that is shipped to, or what it is used for. (Rec., 339-341).

Here we have the statement of this expert for the complainants that the rock is mined for the mineral content, phosphorus; that the only commercial use of

the rock is for fertilizing; that for fertilizing purposes no phosphorus is extracted from the rock, nor is it mined for the purpose of extracting any phosphorus; that it does not contain phosphorus in the uncombined form; and to these several contradictory statements he adds that he does not know what the rock is mined and used for. But let us go a little farther with this expert:

Q. Do you mean to say that it is mined for the purpose of getting this phosphorus out?

A. To put that phosphorus in shape for the plants to use.

Q. Now, don't you know, Mr. Sterling, that the plant cannot use phosphorus not combined, and could not take it up?

A. I did not say it did.

Q. Could it?

A. Not unless it was in soluble form.

Q. Could they take up phosphorus uncombined?

A. They could if in a soluble form, for all I know.

Q. Do you know?

A. I don't know.

Q. As a chemist?

A. I believe they could if it was in a soluble form.

* * * * *

Q. Did you ever know or hear of such a thing as phosphorus in solution, uncombined phosphorus?

A. No; I don't believe it will go in solution alone.

Q. And therefore the plants could not take it up?

A. As I say, it has got to be in solution.

Q. It would be in solution, it must be, in order to take it up?

A. The phosphorus?

Q. Yes.

A. You can put it in the shape of phosphoric acid.

Q. You said you wanted it in solution. I am asking you how you can get it in solution?

A. By making phosphoric acid out of it, and it is—

Q. Is it phosphorus?

A. It is not phosphorus uncombined, but phosphoric acid.

Q. So that phosphorus uncombined is not a soluble substance, then?

A. Not in water.

Q. It is not a soluble substance?

A. Not in water. (Rec., 343, 344).

What an evident attempt on the part of this witness to avoid stating the true condition. He first states that the deposit is mined for the phosphorus, then he states that the phosphorus cannot be used unless it is combined with something else, but he will not admit that the calcium with the phosphoric acid makes the com-

bination which renders the deposit valuable rather than the phosphoric acid alone. After considerable sparring, however, he did finally admit that the deposit was valuable as calcium phosphate, and that the calcium was a material element in the value of the rock, as the following will show:

Q. Mr. Sterling, in relation to this, where calcium oxide is used as a fertilizer.

A. Calcium oxide?

Q. Did you not testify yesterday that it was used commercially?

A. I have testified yesterday that calcium sulphate was used as a fertilizer; you may call it—

Q. Well, that is commonly called gypsum?

A. Yes, sir.

Q. But I am talking about calcium oxide. Calcium oxide is used as a fertilizer, I mean the rock alone?

A. Limestone is, yes.

Q. Slacked lime?

A. Yes, sir. I suppose slacked lime might be used, too.

Q. Now, then, that is used for the benefit which will accrue to the land from the action of the calcium on the land?

A. Well, I must state that I do not—I am not absolutely sure that I know of any calcium oxide. You mean hydrate of calcium?

Q. Well, it is slacked lime?

A. Well, I don't think it is proper to call it calcium oxide.

Q. If that is not the proper term for it, and if I have given it wrong, answer as to what it is.

A. Slacked lime might be used just exactly as limestone is used. To sort of neutralize the—

Q. Alkali?

A. No, sir—well, it might be used to neutralize some of the alkalies, to correct any acidity there might be in the soil.

Q. And as a matter of fact, it is the calcium in it that has that effect?

A. Well, calcium with an earth alkali, and sometimes with some other alkalies, will make a chemical combination and have a sweetening effect.

Q. When slacked lime is used for the purpose stated isn't it true that it is for the purpose of sweetening the land, so to speak?

A. That is what would be used to neutralize the acidity.

Q. And therefore it is the calcium in it that has that effect, isn't it?

A. Yes, sir; partly.

Q. And the calcium phosphate would have like effect, would it not?

A. Why, I don't know, I must say, whether calcium phosphate could be broken up by any other alkali; it might have that effect.

Q. I am speaking about calcium phosphate as it is used as a fertilizer. Would not the calcium

unite and operate to a degree in the same way that the calcium in this lime would operate?

A. As I say, I don't know; I don't think so.

Q. Why do you say you do not think so?

A. Because calcium hydrate, that which is a combination of hydrogen and oxygen and calcium, would act upon, for instance, some of the sodium salts or potassium salts, or with some weak organic acid, where calcium phosphate would not be effective.

Q. Do you mean to say that this calcium that is in the calcium phosphate would be of no benefit whatever upon the land?

A. Not in the sense that—

Q. Would it in any sense?

A. It would be so very slow—it is so insoluble under ordinary conditions that for any practical effect I would consider it useless.

Q. But after the treatment?

A. After the treatment, that is another matter.

Q. Well, then, after the treatment, as you have explained the treatment, as I understand it, after the treatment has been given to the calcium phosphate rock, then would not the calcium in that rock have a beneficial effect as a fertilizing element on the land?

A. After the treatment?

Q. That is what I say.

A. The calcium—

Q. Can't you answer that question yes or no?

A. I am going to. After the treatment the calcium phosphate is changed into different forms of calcium phosphate, some of which is soluble and a part of the calcium is changed into calcium sulphate, that is, gypsum, by this treatment, and that, of course, the gypsum so far as it extends, would have just the same effect there as if it was applied raw.

Q. How about the balance of the calcium that is not changed to a sulphate?

A. It is still in combination with the phosphoric acid, and it is in soluble shape. My opinion would be it would not have this neutralizing effect, because they are acid calcium phosphates.

Q. And it is your information, and do you state positively, that this treatment changes this calcium into calcium sulphate?

A. Part of it.

Q. Did you analyze it?

A. I know it from the chemical formula.

Q. And that this calcium in this rock, after its treatment, has no effect upon the land at all beneficially?

A. I did not say that at all; I said it has no neutralizing effect.

Q. I am not asking about neutralizing effect: I am asking if it has any beneficial effect, and will you not answer my question?

A. I say I doubt whether calcium itself, ex-

cept that which is changed into gypsum, has any beneficial effect.

Q. Would you say that any portion of it would have any beneficial effect?

A. The part changed into gypsum would have some beneficial effect.

Q. What proportion is that? You don't know?

A. Yes.

Q. What proportion?

A. Why, I can tell it by referring to a work on chemistry.

Q. Well, state your opinion without such reference.

A. I say there is a lot of formula that would be useless for anybody to attempt to remember.

Q. I did not ask you that; I asked you if you knew what proportion of a given quantity of sulphate—or calcium phosphate—would be changed to gypsum, can you tell?

A. Yes, I think I can.

* * * * *

Q. Go ahead and let us have it.

A. This (witness refers to a certain sample of phosphate rock) happens to be a high grade piece of rock. It carried 81 per cent of calcium phosphate, and 11 per cent of carbonate of lime, and there is a little magnesia, a little iron, and a small amount of insoluble material. Now, my opinion would be, when that was treated with sulphuric acid, that one-third of the calcium in the 81 per cent

which goes to make up the calcium phosphate in this sample, would be changed to gypsum, and that all of this 11 per cent of calcium carbonate would be changed into gypsum.

Q. So you would have there in the 100 per cent of this rock, 27 plus 11, equalling 38, approximately, per cent of that rock which would be changed into gypsum, which would have some beneficial effect?

A. It would have, as I have before stated, a mechanical and perhaps a chemical beneficial effect upon the soil.

Q. Now, the other rock from any other portion of these claims which are in question in this controversy, would have the same proportionate benefit, considering the quality of rock, that this would have?

A. If they have the same proportion of ingredients it would be just the same, but we have to keep in mind all the while that it requires that chemical treatment to bring about that condition.

Q. Do you not know, Mr. Sterling, that this phosphate rock, this particular rock, perhaps out of these claims, and phosphate rock such as this is, is used in its natural condition just as it is taken out of the ground?

A. I don't know, but I have heard of it, but I don't know of any company that makes a business of preparing and using and selling raw rock in any quantity in that way directly.

Q. There may be some, may there not?

A. Yes, sir.

Q. And if it was so used it would be beneficial?

A. In time, but there would not be anything beneficial owing to the lime or gypsum; it would be simply during the gradual dissolving of the calcium phosphate by the elements.

Q. And that would be beneficial?

A. Or that the phosphorus would become in such a condition it would be taken up by the plant, and the calcium would undoubtedly be set free and have a neutralizing effect on the soil.

Q. To that extent it would be beneficial?

A. Yes, sir.

Q. As it dissolved it would have that beneficial effect itself in time?

A. I think so. (Rec., 397-404).

So Mr. Sterling finally admits that whether the rock is used in the prepared or the natural form the calcium does have a beneficial effect upon the soil.

Because Mr. Weeks, a witness for appellee, classified arsenic and antimony as non-metals, counsel says his testimony is entitled to no weight. Mr. Wilson, appellants' witness, who is a chemist, says that it is uncertain how these two substances should be classified (Rec., 435). But assuming that Mr. Weeks is in error (and counsel says he is—Appellants' Brief, 93, 94), the quality of his testimony is very far superior to the biased statements of this man Sterling, upon whom appellants place their chief reliance, and who is so anxious to see appel-

lants prevail that in order to avoid the admission that calcium phosphate should be subject to the same form of location as calcium sulphate or gypsum, as it is commonly called, declares that calcium phosphate is not locatable as placer because it is treated chemically after it is mined (Rec., 349), and that the manner of locating it should be determined by the manner of such treatment (Rec., 358). Not only in his testimony above quoted, but throughout his entire cross-examination, Mr. Sterling qualifies, equivocates, trims and sidesteps in his attempt to avoid any statement of fact which might operate in favor of appellee, and he convicts himself of being not only prejudiced and unfair, but deliberate in his attempt to conceal the truth.

Notwithstanding counsel's refusal to accord his testimony proper credit, the evidence shows that Mr. Weeks has not only studied phosphate rock and the method of its treatment (Rec., 545, 546), but has purchased and used the rock both in its prepared and unprepared state (Rec., 545 and 549). He therefore should know for what purpose the calcium phosphate is mined and for what it is valuable. He testifies:

Q. What proportion of calcium phosphate does this rock contain that is found in these beds on this property—on these claims in question?

A. It goes about 70 per cent.

Q. And is it mined or used for phosphorus or for any phosphorus content in it?

A. No, sir; there never has been any phosphorus made from this rock that I know of.

Q. Is the calcium—the constituent of calcium that is found in this rock—of beneficial use as a fertilizer on the land?

A. Yes, sir.

Q. And what effect does it have?

A. The effect of the calcium in the calcium phosphate is similar to that of ordinary lime, which we put upon the soil to sweeten it.

Q. What would be the effect of using the phosphoric acid that is within this deposit, if the calcium were extracted and the phosphoric acid alone was used?

A. Well, I don't think you could use it in that way. You would have to have some material to carry your phosphoric acid, in order to put it upon the soil.

Q. If it could be carried, what would be the effect of it? Would it be beneficial or otherwise?

A. Well, I don't know. I think it would be entirely speculation to say what would be the result.

Q. How does the phosphoric acid act upon the land, as compared with the calcium that is in this calcium phosphate, and how do the two act together as a fertilizer?

A. Well, the calcium—the combined calcium phosphate which is in the fertilizer, acts in two ways, one of which furnishes phosphoric acid for use to the growing plant, and the calcium, which is the chemical combination, acts in sweetening the land, or in changing its mechanical condition so as to improve the quality of the soil.

Q. Is it essential that calcium be used in connection with this phosphoric acid in this deposit for fertilizing purposes?

A. Yes, sir.

Q. Now, in the preparation of this rock, is there any sorting of it, or any part of it that is not used as fertilizer?

A. None at all; it is all used.

Q. And is there any part of it that is not beneficial to the land when treated as you have described it?

A. Well, it is such a small part that it is almost infinitesimal. There is a small amount of silica shown in various chemical analysis that would probably neither be beneficial nor otherwise to it, but it is exceedingly small.

Q. But speaking of calcium phosphate itself: is there any part of it that is not beneficial?

A. No, sir.

Q. And is this phosphate rock mined and used as a whole?

A. Yes, sir. (Rec., 547, 548).

Q. You spoke of the plant taking up the calcium phosphate. I will ask you whether or not this phosphoric acid is the only constituent which is used by the plant?

A. No, I don't think so. There is some lime that is used by practically all plants; and undoubtedly some of the lime or gypsum which is in the

treated fertilizer would be used by the plant. (Tr., p. 224).

Q. For what purpose is gypsum used, Mr. Weeks, I mean for fertilizing purposes?

A. In the same way that we use lime for treating soil which is becoming very sour and will not yield paying crops.

Q. And what effect does the calcium in the calcium phosphate have. Does it have a different effect, or the same effect, or a similar effect to the gypsum or lime?

A. My own experiments, if you may call them such, show that the calcium phosphate will sweeten the soil to a very considerable extent, and doubtless in the same way, the same chemical combinations taking place, and the chemical conditions being made, that occur with lime.

Q. What proportion of this calcium phosphate is calcium, what per cent approximately?

A. I have forgotten exactly; calcium carbonate runs up to something like 30 per cent.

Q. In what states, Mr. Weeks, from your study of this question, have experiments been made as to the profitable use of this phosphate rock in its raw state, and covering what periods of time?

A. Experiments have been made with the raw phosphate rock in Maine, Massachusetts, Rhode Island, Pennsylvania, Maryland, Ohio and Illinois. They are experiments of what are known as the

United States Experiment Stations, conducted under the Agricultural Department, and those experiments cover a period of from five years as a minimum, in Illinois, to 21 years as a maximum in Massachusetts.

Q. And compared with the use of the rock in its treated state, what do those experiments show?

A. In the various publications which I have read describing those experiments, the summary or conclusion is that under proper conditions (where a large amount of humus exists), the raw phosphate rock is worth probably double what the treated rock is. The experiments in Maryland were conducted at the station at College Park. I have been there a good many times, in different seasons and at different years, watching the results of these experiments, and it was as a result of these personal observations there in the field that I began the use of the raw rock upon my own farm.

Q. And in the conduct of these experiments I will ask you whether or not there is any sorting process, or whether the rock is used as a whole?

A. Well, so far as I know, there is no sorting process. The material as it comes out of the sack as you buy raw rock, looks like raw ground phosphate rock. (Rec., 549-551).

We have quoted extensively from the evidence upon the question of the character and valuable properties of this rock in order to convince the court that our conten-

tion is well founded that the characteristics of a vein, to-wit, rock in place bearing a certain valuable mineral to be extracted, is not present in this deposit. The foregoing testimony clearly shows that this calcium phosphate is not valuable, is not sought after, is not mined or used for any particular mineral, but is mined and used, and is valuable only for the combination of calcium and phosphoric acid; the calcium as well as the phosphoric acid being a necessary and beneficial constituent just as it is beneficial in gypsum and lime. Calcium phosphate belongs to the same category of mineral deposits as gypsum, guano, limestone, borax, salt, kaolin, cement, etc. This is evident from the authorities (Morison on Mining Rights, 14th Ed., p. 243; Shammel on Mining Mineral & Geological Law, pp. 58, 277; Outlines of Mining Law by C. B. Jack, p. 70, Index p. 115), as well as from the testimony of Mr. Wilson, who states at pages 438 and 439 of the transcript that calcium phosphate is composed of the metal calcium (this metal, however, is not in its metallic form when in combination), and the non-metallic mineral phosphoric acid; salt, of the metal sodium in combination with the non-metallic mineral chlorine; gypsum, of the metal calcium in combination with the non-metallic mineral sulphur; limestone, of the metal calcium in combination with the non-metallic mineral carbonic acid, and all these deposits are mined, are of commercial value and are used as a whole. The deposit is a bed just as the deposits above named are beds. Encyclopedia Britannica, 9th Ed., in the article on "Mining," classifies mineral deposits as follows:

- A. Tabular Deposits. 1. Beds.
2. Mineral veins or lodes.

B. Masses.

In discussing "beds" it is said:

"Geology teaches us that a large proportion of the rocks met with at the surface of the earth consist of substances arranged in distinct layers, owing to the fact that these rocks have been formed at the bottom of seas, lakes or rivers by the gradual deposition of sediment, by precipitation from solutions, and by the growth or accumulation of animal and vegetable organisms. If any one of these layers consists of a useful mineral, or contains enough to make it valuable, we say that we have a deposit in the form of a bed, stratum or seam. Of course the most important of all bedded or stratified deposits is coal, but, in addition, we have beds of anthracite, lignite, iron ore, especially in the oolitic rocks, cuprififerous shale, lead-bearing sandstone, silver-bearing sandstone, diamond, gold, and tin-bearing gravels, to say nothing of sulphur, rock-salt, clays, various kinds of stone, such as limestone and gypsum, oil-shale, alum-shale, and slate.

To briefly summarize, then, the evidence shows that the calcium phosphate deposit lacks the following characteristics of a vein, to-wit:

1. It is not found within a fissure, crevice or rift in the earth's crust.
2. It is not mineralized or mineral-bearing

rock, nor is it valuable for any specific mineral content, but only as a whole.

3. It contains no metallic mineral.

4. It was not deposited by being forced from the depths of the earth by igneous action, nor was it deposited by replacement.

5. It invariably conforms to the stratification in which it is found and does not break through it as does a fissure vein or replace it, as does a bedded vein.

6. It is not foreign to the country rock, but is of exactly the same character (sedimentary) and forms a part of the earth's crust as originally laid down, and occupies the same position (horizontal), as originally deposited except that in certain localities it has been given a dip and a strike by the uprising or folding of the earth.

In addition to these distinctive characteristics, we will also add that it contains abundant specimens of fauna, and fauna has never been known to exist in a vein though it has been found in the country rock of veins. (Rec., 577).

Furthermore, a vein has an apex conforming to the strike from which may be determined the owner's rights on the dip. This deposit does not have an apex, but simply an irregular exposure in various places occasionally along the strike, but more often not, and sometimes the exposure (claimed as the apex by the lode claimants), is actually on the dip of the bed far below the

highest point of exposure. For example, the "Tennessee lode" is located on the exposure along the side of a gulch at right angles with the strike, and having end lines 1500 feet long and side lines 50 feet (it lies within the patented Waterloo placer), while the "Mt. Pleasant lode" is located on the exposure on the upper side of Montpelier Creek channel, at variance with the strike, and with the dip of the deposit up the hill towards the "Arkansas." "It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike outside of his side lines." (Mining Co. vs. Tarbet, 98 U. S., 463, 467). Of all the lode claims the "Hickman" only is located along the strike (Rec., 771-772), and it is not located on the apex (so called) of the deposit, for as shown by the black line on Defendant's Exhibit 2, the deposit occurs above the "Hickman." The same is true of the "Obed" lode. As Mr. Bell states, if this deposit were locatable as lode a location on the "Wilmington" placer across the gulch and higher than the "Obed" would steal a third of the apex of the "Obed." (Rec., 766). The "Overton" is not located on the apex; in fact, this claim has no apex. It covers the exposure of the deposit on the lower side of the creek channel opposite the "Mt. Pleasant," the exposure shown on both these claims having been due to the erosion by the creek. The "Arkansas" is the uppermost location of the very same bed which on its dip extends down the hill to the creek bed where, as before stated, it is again relocated both where it emerges on the "Mt. Pleasant" and where it disappears on the "Over-

ton." The very manner of laying out these lode claims is proof that such a deposit as this cannot with reason be held to be subject to lode location. It is nothing more nor less than a great blanket of sediment hundreds of square miles in extent, exposed where the waters and snows of creeks and gulches have eroded the surface, leaving an irregular edge (as shown by the black line on Defendant's Exhibit 2), which dips and curves in degree according to the extent erosion has taken place; the uplifted condition of the bed in some localities being a mere accident of nature and not presenting what may be termed the typical form of the deposit, which may be said to be horizontal, or nearly so.

It was not the intention of the law to grant extralateral rights to a deposit of this character. The law contemplates that a discoverer of a vein may pursue it from its apex indefinitely on its downward course because a vein occupies (usually) a fracture of the earth's strata, but it does not contemplate that lode locations shall be made on one of the stratum itself. This deposit or stratum is known to extend on its dip for a distance of eight miles (Rec., 680, 735), and in places is visible as a continuous sheet or plane for a distance of twenty miles. (Rec., 669). Furthermore, in some localities, for instance, at Georgetown, the deposit (see Defendant's Exhibit 5), is folded and presents a sincline; on one side of the fold the bed dips to the west and on the other to the east. Were lode locations ever intended to apply to such a formation?

From all these conditions it is quite apparent that while calcium phosphate is "rock in place" it is not a

“vein,” and is therefore subject to location only as placer.

We shall now discuss the validity of the lode locations in view of the circumstances under which they were made.

LODE LOCATIONS INVALID.

It is stipulated that the physical acts required by law to perfect lode locations, were performed, but with the reservation that the evidence as to the circumstances under which they were performed, shall be given full effect. (Rec., 453, 454).

It appears by the pleadings that the premises in controversy are valuable only for the calcium phosphate deposit, and the proof shows that discovery and assessment work was done by appellee and its predecessors in interest upon the phosphate bed. We shall now present our reasons why appellant's locations were and are invalid.

LODE CLAIMANTS TRESPASSERS.

We are not unmindful of the decisions to the effect that known lodes within a placer are subject to location either by the placer entryman himself or by any other person qualified under the mining laws to locate mineral lands, but this case does not fall within that rule. We have shown that this deposit in question is not a lode, but we shall point out other considerations which justify the exception. Where the right to locate a lode within a placer has been upheld it has been upon the theory

that the deposit ascertained to be a lode was not the deposit located upon by the placer claimant and the deposit located as lode was such that the government had recognized possession thereof under lode locations only. In such cases the placer locator had discovered and was developing an altogether different deposit from the deposit claimed by the lode location. Under such conditions the courts have upheld the right of another person to locate upon a recognized lode formation which the placer claimant did not and could not under the law assume to possess, but in this case the conditions are quite different. The calcium phosphate bed is the deposit upon and for which the placer locations were made. It is the only valuable mineral deposit within the boundaries of such locations. It is the deposit which the placer claimant has possessed and over which it has exercised dominion in maintaining its locations and performing assessment work. Under these conditions appellants are certainly not to be considered in the same light as one who seeks to acquire a deposit which the placer locator does not claim, but rather as deliberate intruders and trespassers. Appellants will argue that defendant was not and could not, by virtue of its placer locations be in possession of the conflict area because the ground is not placer ground. In the case of *Clipper Mining Co. vs. Eli Mining Co.* (Col.), 68 Pac., 286, substantially the same contention was made, but the court justified its decision for the placer claimant upon the ground that said claimant was prior in time and had performed the annual assessment work required by law. The land had not been classified as non-placer by the

Land Department and the court held that the placer location gave a right of *exclusive* possession such as prevented the initiation of any rights by other persons who might prospect for or locate lodes thereon. This case, which we have heretofore cited, clearly recognizes that where, as in the case at bar, the same ground is claimed under different locations, the right of possession is in the prior locator who has complied with the law and that to the Land Department is left the classification of such land. To quote from the opinion by Justice Brewer:

“It must, therefore, be accepted that the Pea-cl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location, so the trial court specifically found, and its finding was approved by the Supreme Court.”

* * * * *

“So far as the record shows—and the record does not purport to contain all the evidence—the *placer location is still recognized in the Department as a valid location.*”

“Such, also, was the finding of the court; and being so, there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant’s right to one. Undoubtedly when the Department rejected the application for patent it could have gone further and set aside the

placer location, and it can now by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have."

Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221, 223: 48 L. Ed., 948, 949.

It is our contention here, that while appellee held such possession of its placer claims as would satisfy, or be recognized by, the Land Department, appellants could not prospect for lodes (which their agents were in the act of doing when ordered off by Mr. Sullivan) (Rec., 491), or make valid lode locations. Did appellee have possession such as the Land Department recognizes in locations upon the deposit of calcium phosphate? Let us see: The Department prior to appellants' lode locations had recognized appellee's possession as a placer claimant as sufficient by the issuance of patent to the "Waterloo" placer in 1906; and since the filing of this suit it has repeatedly recognized possession under placer locations as sufficient, by the issuance to the Utah Fertilizer & Chemical Mfg. Company of final certificates which embrace more than 600 acres of this same deposit (Defendant's Exhibits 6 and 7, Rec., 841-843); and by the issuance to appellee of a final certificate (Defendant's Exhibit X) and patent for the "Windward" placer adjoining the Montpelier group involved herein; and for the "Layland" placer in the Sublette range in Wyoming, near the claims involved in the case before the Circuit Court of Appeals for the Eighth Circuit. (De-

fendant's Exhibit 8, Rec., 846-847). If possession in those cases was a sufficient possession under the law, was not appellee, having performed all physical acts to render its locations valid, in possession of the premises in controversy when the appellants attempted to make their lode locations in November, 1907? Was not appellee's possession of its placer claims at that time just as effectual as its possession of the "Waterloo" before it received patent therefor, as effectual as its possession of the "Windward" and "Layland" claims; as effectual as the possession the Utah Fertilizer & Chemical Mfg. Co. exercised with reference to its claims near Georgetown? It is quite apparent that in the absence of a classification of the ground as non-placer by the Land Department, appellee's locations were valid and their right to exclusive possession complete.

Appellants set forth in their brief the decision of the Assistant Secretary of the Interior holding the Harry lode claim patentable and discussing in a general way the western phosphate deposits. In this decision Assistant Secretary Adams refers to the report to the Land Department covering the "Lorine" lode which adjoins the Harry lode, and upon this report bases his conclusions as to the character of the deposit. This report was made by Mr. Guy Sterling, who testified on behalf of appellants herein (Rec., 318; Appellant's Brief, 117), and the court will notice that at the time Mr. Sterling submitted his report he was interested in lode locations upon this very deposit of calcium phosphate (Rec., 380, 381, 391), notwithstanding the fact that he was a Deputy Mineral Surveyor and that the penalty for

such an officer becoming interested in the purchase of any of the public lands, directly or indirectly is removal from office. In re Bradford, 36 L. Dec., 61. He did not inform the Department of his interest in having the deposit declared to be a lode in the "Lorine" case. (Rec., 392). In his report Mr. Sterling indicates clearly his prejudice in favor of lode locations. For example, in describing the formation he is careful to repeatedly designate the alternating strata of calcium phosphate as "veins," and against the weight of reason and contrary to the facts clearly established by the evidence suggests the process of replacement of beds of limestone by the phosphate as the probable manner of deposition. This suggestion was undoubtedly made to induce the classification of rock phosphate with bedded veins when in fact they are totally dissimilar. The report is not only highly colored and misleading in favor of the lode theory, the reason for which is readily discernible, but it is in many important respects incomplete, and exhibits a very superficial knowledge of the nature, character, origin and use of the rock phosphate deposit and should never have formed the basis for any action by the department. It is worthy of note in this connection that the department particularly declined to have its decision in the "Lorine" case considered as a precedent. In his opinion (not reported), the Commissioner of the General Land Office states:

"In the introductory part of his brief, counsel for the entryman states that in the section of the country where these claims are situated there seems to exist a diversity of opinion among lawyers acting

for proposed locators as to whether the locations in this field should be as 'lode' or as 'placer' locations, from which it might be inferred that it was expected that the decision in the several mineral entries under consideration respecting whether they are lodes or placers would forever set at rest the chaotic state of affairs in this respect and make certain that all future phosphate locations in this territory must be made in conformity to the views herein expressed. It is not intended that this opinion shall have any such effect, and it could not have any such effect even if it were so intended. This opinion is designed to settle nothing but the matter involved in these entries, namely: whether they may be patented as lode mining claims under Section 2320 of the U. S. Revised Statutes relating to lode mining claims."

If the Land Department would not declare the "Lorine" lode decision, based on Sterling's report, to be binding as a determination of how calcium phosphate should be located, is it reasonable to suppose that its decision in the "Harry" lode case based on the same report is any more conclusive? The Harry lode decision can not affect appellee's right to the claims here in controversy; they can only be passed on when the matter of their patentability as placer comes regularly before the Department. The "Harry" lode decision is simply an adjudication upon an ex parte showing the same as the "Lorine" decision. In view of these conditions, appellee's right of possession of these claims must be deemed to be recognized by the Land Department exactly

to the same extent as its possession prior to patent of the "Waterloo" and "Windward" placers was recognized, and to the same extent as its possession of the "Layland" placer and of other claims, in northern Utah has been recognized by the issuance of final certificates of entry for said claims. None of the ground embraced within the claims here involved has been classified as non-placer by the Land Department. Appellee's possession must certainly be deemed valid and therefore a possession with which appellants had no right to interfere and in the face of which they could initiate no right, for, as stated in *Thallman vs. Thomas*, III Fed., 277-279, "A valid location of public land cannot be instituted while another has the possession and right of possession under an earlier lawful location."

See also *Clipper Mining Co. vs. Eli Mining Co.*,
supra.

Appellee, up to the advent of appellants, had worked its claims as required by law, and as shown by the evidence, when appellee was temporarily absent, appellants attempted to establish themselves. This they could not do. In the words of Circuit Judge Ross:

"One who is in the actual possession of mining claim, working it for the mineral it contains and claiming it under laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his claim."

Nevada Sierra Oil Co. vs. Home Oil Co., 98
Fed., 673.

We call attention also to another decision by this court, viz: Cosmos Exploration Co. vs. Gray Eagle Oil Co., 112 Fed., 4, wherein the court held that land was not "vacant and open to settlement" when in the actual occupancy of others; that the fact of occupancy prevented the initiation of rights by other locators, and in the course of the opinion the court calls attention to a number of cases which in substance hold that locations are invalid when made by invasion of the actual possession of another.

In Kirk vs. Meldrum (Col.), 65 Pac., 634, it is said:

"Title to a mining claim cannot be initiated by an entry upon a prior, valid existing location. Moyle vs. Bullone, 7 Colo. App., 308, 44 Pac., 29. The fundamental principle governing the rights of parties to claims upon the public domain is that the bona fide occupant, for a purpose recognized by the law, is entitled to hold possession as against one subsequently attempting to initiate title to the same premises, unless the latter establishes a state of facts clearly demonstrating that the actual occupant is in possession without right."

In this case the record and the action of the Land Department clearly show that appellee was in rightful possession of the conflict area at the time appellant's lode locations were made and that the prior locations of appellee were such as had been respected by and such

as were entitled to the respect of, the Land Department.

Not only were appellants trespassers in attempting to locate their claims, but in face of appellee's protest proceeded with their discovery work. The following year, 1908, they were kept off the premises by appellee and thereupon obtained a temporary injunction to enable them to do assessment work. Appellee agreed that in consideration of the dismissal of the suit appellants might do their assessment work for *1908 only* (Rec., 170-175—not to remove any other mineral, however), and appellants, after obtaining permission to go upon the premises, remained thereon during the early part of 1909 and did the work for that year also in violation of the agreement (Rec., 169-175). In 1910 they again disregarded appellee's protest against their going upon the premises (Rec., 168). Appellants were not only trespassers in attempting to locate, but trespassers whenever they did work on the ground except for the year 1908. Under these conditions they could not initiate or acquire any rights.

There is an additional reason why appellants' lode locations were and are invalid, even assuming for the sake of argument that the phosphate deposit was subject to location as lode. It is this: Appellants' locations were not made peaceably.

LODE LOCATION MUST BE MADE PEACEABLY.

In speaking of lode within a placer, which presents a condition where the locators are not seeking to acquire the same deposit, and which, therefore, does not present so strong a case for the placer locator as under the con-

ditions in this case, Lindley in his work on Mining Law, says :

“Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverer. If he fails to do so it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; provided always, that such *appropriation is made and perfected peaceably and in good faith*. In this respect, the same rules of law which govern the locations of mineral land occupied or claimed by others under inchoate agricultural holdings, are to be applied.”

Lindley, Vol. 1, Sec. 413.

In discussing the question of the right of a person to go upon a homestead entry of another to locate mining claims, the same author states that such right exists, but adds :

“But there is another important principle which is also to be recognized. No rights under the public land laws can be initiated through a trespass. We do not think the law would sanction an invasion of a homestead claimant’s enclosure for the purpose of prospecting for minerals.”

Lindley, Vol. 1, Sec. 206.

See also

Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221; 48 Law Ed., 944.

Costigan, in his work on Mining Law, says:

“No trespass must be committed in making discovery and location, and the location must be made *peaceably* and perhaps not clandestinely.”

Costigan, p. 267.

The evidence shows that all the claims of the appellee, except the Wizard, were located during the months of June, July and August, 1904, and that the Wizard claim was located in December, 1905; that appellee and its predecessors in interest during each calendar year performed and made proof in due form of the required assessment work. These facts were all shown by the public records and by the workings upon the ground and were known to appellants.

Notwithstanding that discoveries had been made, corners established and notices posted on November 16th and 17th, 1907, as appears by the stipulation (Rec., 453), the lode locations were not completed until as to each claim, the affidavit required by Section 3216, Revised Codes of Idaho, 1909, had been made and attached to the copy of the notice of location and filed for record with the county recorder, and this was not done until the 17th day of January, 1908. The affidavit so required

of a locator is to the effect that the ground has not, to the best knowledge and belief of affiant, been located, or if so located, that the same has been abandoned or forfeited, and that the affiant has opened new ground to the extent or depth of ten (10) feet as required by the laws of the State of Idaho.

The Supreme Court of Idaho in the case of Van Buren vs. McKinley, 8 Ida., 93; 66 Pac., 936, has declared that such affidavit is essential to make a location valid. To quote:

“It is contended by counsel for appellant that an affidavit is not necessary to make a valid location; that the law requiring it imposes a condition precedent upon citizens about to locate mining ground not contemplated by the laws of the United States, and in conflict with them, and therefore the state law imposing such condition is absolutely void. Under the provisions of Section 2322, Rev. St., U. S., state, territory, and local regulations are authorized to be imposed as a condition precedent to the possession of mining claims, not in conflict with the laws of the United States. Requiring an affidavit to be attached to the location notice of a mining claim as provided by Section 3104, Rev. St., is not in conflict with the provisions of said Section 2322. It is a reasonable regulation that the legislature is fully authorized to make. Dunlap vs. Pattison (Idaho), 42 Pac., 504. The Supreme Court of Montana in several cases have held that the statute requiring an affidavit to a location notice of a mining claim was not in contravention of the federal stat-

utes. *McBurney vs. Berry*, 5 Pac., 867; *McCowan vs. McLay*, 40 Pac., 602; *Berg vs. Koegel*, 40 Pac., 605.”

See also:

McBurney vs. Berry (Mont.), 50 Pac., 867.

McCowan vs. McLay (Mont.), 40 Pac., 602.

Kendall vs. San Juan Silver Mining Co., 144 U. S., 658; 36 L. Ed., 583.

On December 6, 1907, Colebath and Samson, employes of appellants, while prospecting, were ordered off the premises by Mr. Sullivan (Rec., 490, 491), and Mr. Duffield was ordered off when preparing to do assessment work on January 6, 1908. (Rec., 490, 492). These protests and objections of the appellee were, therefore, made long prior to the date when the lode locations were completed, to-wit: January 17, 1908 (see Complainants' Exhibits 2 to 12 inclusive and stipulation filed here February 20, 1913), the date when the affidavit required by the Idaho statutes was filed with the copies of the notices of location. In fact, these protests were made before the work of opening new ground referred to in said affidavit had been done. The evidence, therefore, shows without contradiction, that the locations were not made peaceably, but in the face of positive protests of the appellee made as soon as appellants were discovered upon the premises. In *San Francisco Chemical Co. vs. Duffield*,Fed.,, the Circuit Court of Appeals was careful to suggest that “there is nothing to indicate that appellee’s entry upon

the premises in question was other than "peaceable," which is a condition altogether different from that shown by the record in this case.

CONCLUSION.

Appellants' claim is, at most, based upon a technical contention. Notwithstanding appellee's locations were made and have been maintained in good faith, appellants would nevertheless exclude it from the property. How was appellee's predecessors to determine how phosphate should be located? Mr. Bell, who is a practical mining man, says he would be governed largely by the hand books on mining. (Rec., 784). These hand books, including that of Mr. Jack, one of appellants' counsel, classify phosphate as subject to location as placer; Morrison (14th Ed.), p. 243; and furthermore, the Land Department had likewise so classified it (18 L. Dec., 58). Mr. Bell further states that the ordinary prospector would not take this deposit from its physical appearance to be lode (Rec., 773, 774), and the proof is to the effect that Mr. Glenn of Montpelier and prospectors in the Teton country instead of taking it to be a lode formation, concluded that it was a coal bed. (Rec., 551-553, 774).

Although appellee, between the date of the location of its claims and the date when appellants attempted to make their locations, might at any time have located upon the deposit as lode, its belief that placer locations were proper was confirmed in 1906 by the issuance of the patent for the "Waterloo" and it, therefore, continued

in good faith to maintain its locations, and as before stated, the Land Department has since repeatedly justified appellee's course. Appellants are simply claim jumpers, seeking to take advantage of what they conceive to be an opportunity to acquire property which appellee as a bona fide locator has always possessed, and upon which it has expended thousands of dollars under the encouragement of the government.

Under the facts, the law and the equities, appellee was entitled to the award of right of possession and the decree appealed from should be affirmed.

Respectfully submitted,

CLARK & BUDGE,

Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

METROPOLITAN REDWOOD LUMBER COMPANY,
a Corporation,

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

FILED

FEB 25 1913

No. 2204

United States
Circuit Court of Appeals
For the Ninth Circuit.

METROPOLITAN REDWOOD LUMBER COMPANY,
a Corporation,

Plaintiff in Error,

VS.

HUGH DAVIS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
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*In the Superior Court of the County of Humboldt,
State of California.*

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation, and THOMAS E. AT-
KINSON,

Defendants.

**Order for Removal to the Circuit Court of the United
States, Ninth Judicial Circuit, in and for the
Northern District of the State of California.**

The defendant Metropolitan Redwood Lumber Company having within the time provided by law filed its petition for the removal of the above-entitled cause to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, and having at the same time offered a bond in the sum of Three Hundred (300) Dollars with a good and sufficient surety, pursuant to the statute in such cases made and provided and conditioned according to law:

NOW, THEREFORE, THE COURT DOES HEREBY APPROVE and accept said petition, and does order that this cause be removed for trial to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, pursuant to the Statute of the United States in such cases made and provided, and that all

2 *Metropolitan Redwood Lumber Company*

further proceedings of this court be stayed.

Dated Sep. 8, 1911.

CLIFTON H. CONNICK,

Judge.

Filed Sept. 8, 1911. Geo. W. Cousins, County
Clerk. By F. M. Kay, Deputy. [1*]

*In the Superior Court of the County of Humboldt,
State of California.*

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation, and THOMAS E. AT-
KINSON,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, United States Fidelity and
Guaranty Company, a corporation duly organized
and existing under and by virtue of the laws of the
State of Maryland and duly licensed to transact a
surety business within the State of California is held
and firmly bound unto the above-entitled plaintiff,
his heirs, executors, administrators and assigns, in
the sum of Three Hundred (300) Dollars, lawful
money of the United States of America, for the pay-
ment of which sum well and truly to be made the
undersigned surety binds itself, its successors and

*Page-number appearing at foot of page of original certified Record.

assigns, firmly by these presents.

THE CONDITION of this obligation is such that whereas, the defendant Metropolitan Redwood Lumber Company, a corporation, has applied by petition to the above-entitled court for the removal of the above-entitled cause to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of the State of California, for further proceedings, on the grounds in the said petition set forth, and that all proceedings in said action in said Superior Court be stayed:

NOW, THEREFORE, if the said petitioner the Metropolitan Redwood Lumber Company shall enter in said Circuit Court of the [2] United States, Ninth Judicial Circuit, in and for the Northern District of California, on or before the first day of the next ensuing session, a copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said surety has caused its corporate name and seal to be hereunto affixed, this 19th day of July, 1911.

THE UNITED STATES FIDELITY &
GUARANTY COMPANY.

By PETER BELCHER, [Seal]

Attorney in Fact.

[Endorsed]: Filed July 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy.

[3]

State of California,
County of Humboldt,—ss.

On this 19th day of July, A. D. 1911, before me, J. P. Mahan, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Peter Belcher, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company, and the said Peter Belcher acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereunto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the County of Humboldt, the day and year in this certificate first above written.

[Seal] J. P. MAHAN,
Notary Public, in and for said County of Humboldt,
State of California.

[Endorsed]: Filed July 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy.
[4]

[**Affidavit of Thomas G. Atkinson.**]

*In the Superior Court of the County of Humboldt,
State of California.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY (a Corporation) and THOMAS E.
ATKINSON,

Defendants.

State of California,
County of Humboldt,—ss.

Thomas G. Atkinson, being first duly sworn, deposes and says, that he is one of the defendants named in the above-entitled action and erroneously called Thomas E. Atkinson; that he is now and was at all times in said complaint mentioned a resident of the County of Humboldt, State of California.

That he is now and was, at all times in said complaint mentioned, the General Superintendent and Manager of the Metropolitan Redwood Lumber Company, a corporation, the other of said defendants above named; that he is one of the stockholders of said corporation the Metropolitan Redwood Lumber Company, and has no interest or estate in any of the property of said corporation, other than the interest and estate which he owns by virtue of being one of the stockholders thereof; that he has never at any of the times mentioned in said complaint, or at all, conducted or been interested in any business what-

ever with the said corporation as an individual, or in any [5] other capacity, except as a stockholder of said corporation and as the General Superintendent and Manager thereof, and has no interest in any of the property of said corporation and particularly the property described in the complaint herein, except as aforesaid.

That on the 15th day of August, 1910, and at the time the plaintiff above named was injured as alleged in said complaint herein, and for some time prior thereto, your affiant was absent from the county of Humboldt. And your affiant further avers that he has been joined as defendant herein fraudulently and not in good faith, and for the sole purpose of preventing the removal of this action to the Circuit Court of the United States, as petitioned for by the said corporation.

THOMAS G. ATKINSON.

Subscribed and sworn to before me this 12 day of August, 1911.

[Seal]

OTTO C. GREGOR,

Notary Public in and for the County of Humboldt,
State of California.

Due service and a copy of within admitted this
15th day of Aug., 1911.

PUTER & QUINN,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 16, 1911. Geo. W. Cousins,
County Clerk. By F. M. Kay, Deputy. [6]

*In the Superior Court of the County of Humboldt,
State of California.*

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation, and THOMAS E. AT-
KINSON,

Defendants.

**Petition for Removal of Cause on the Grounds of
Diverse Citizenship to the Circuit Court of the
United States, Ninth Judicial Circuit, in and for
the Northern District of California.**

To the Honorable the Superior Court of the State of
California, in and for the County of Humboldt.

Your petitioner, Metropolitan Redwood Lumber
Company, respectfully shows:

I.

That it is one of the defendants in the above-en-
titled action; that said action has heretofore been
commenced in the above-entitled court against your
petitioner and Thomas E. Atkinson; that said action
is of a civil nature.

II.

That the time has not elapsed within which your
petitioner is allowed under the rules of practice, the
laws of this State and the rules of this court to ap-
pear in the said action and plead to the complaint on
file herein, or to take such other action herein as it

may deem proper, and that your petitioner has not heretofore appeared herein or filed any pleadings or made any motion in the above-entitled action.

III.

That the plaintiff in the above-entitled action claims in substance that he is entitled to recover from the defendants the sum of Twenty-five Thousand (25,000) Dollars, as damages by reason of the alleged negligence of each of said defendants in the conduct of certain logging operations, whereby it is alleged in said complaint [7] the plaintiff was injured.

IV.

That your petitioner disputes said claim and denies any and all liability by reason of any of the matters and things set forth in said complaint.

V.

That the matter in dispute in this action exceeds the sum of Two Thousand (2,000) Dollars, exclusive of interest and costs.

VI.

That at the time of the filing of the complaint herein, and at all of the times in said complaint mentioned, your petitioner was and now is a corporation organized and existing under and by virtue of the laws of the State of Michigan.

VII.

That the controversy in this action between said plaintiff and your petitioner is wholly between a citizen of the State of California on the one side and a corporation organized and existing under and by virtue of the laws of the State of Michigan on the

other side; that said controversy is a separable one, and that while a resident of this State has also been joined as defendant herein, your petitioner is informed and believes, and on such information and belief alleges, that said joinder was made fraudulently and not in good faith, and was made for the purpose of preventing the removal of this action to the Circuit Court of the United States.

VIII.

That your petitioner presents herewith a good and sufficient bond as provided by the Statute of the United States in such cases.

YOUR PETITIONER THEREFORE PRAYS that this Honorable Court proceed no further herein, excepting to make an order of removal as required by law, and to accept the bond presented herewith, and that a transcript of the record herein be directed to be made and [8] filed in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, as provided by law.

METROPOLITAN REDWOOD LUMBER
COMPANY.

By THOMAS G. ATKINSON,
President.

OTTO C. GREGOR and
MAHAN & MAHAN,
Attorneys for Petitioner.

State of California,
County of Humboldt,—ss.

Thomas G. Atkinson, being duly sworn, deposes and says: That deponent is an officer, to wit, the

President of the Metropolitan Redwood Lumber Company, a corporation, one of the defendants in the above-entitled action; that deponent has read the above and foregoing petition and knows the contents thereof; that the same is true of deponent's own knowledge except as to the matters which are therein stated on deponent's information or belief; and as to those matters, that deponent believes it to be true; that said defendant is a corporation, and deponent makes this verification for it and on its behalf.

THOMAS G. ATKINSON.

Subscribed and sworn to before me this 19th day of July, 1911.

[Seal]

J. P. MAHAN,

Notary Public in and for the County of Humboldt,
State of California.

Due service of the within petition is hereby admitted this 20th day of July, 1911.

PUTER & QUINN,

Attorney for Plaintiff.

[Endorsed]: Filed Jul. 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. [9]

*In the Superior Court of the County of Humboldt,
State of California.*

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation, and THOMAS E. AT-
KINSON,

Defendants.

Demurrer [of Thomas G. Atkinson].

Now comes the above-named defendant, Thomas G. Atkinson, erroneously named in the complaint as Thomas E. Atkinson, and demurs to the Complaint on file herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant Thomas G. Atkinson.

II.

That there is a misjoinder of parties defendant in this, that it appears from said complaint that defendant Thomas E. Atkinson is improperly joined as defendant in said cause, for the reason that it further appears from said complaint that no cause of action exists against him.

III.

That said complaint is unintelligible in this, that it cannot be known or determined therefrom whether plaintiff claims that his alleged injuries

12 *Metropolitan Redwood Lumber Company*

were occasioned or caused by the negligence of the Metropolitan Redwood Lumber Company or by the negligence of Thomas E. Atkinson, or by the joint negligence of both of said defendants.

OTTO C. GREGOR and
MAHAN & MAHAN,

Attorneys for Defendant Thomas G. Atkinson. [10]

[Endorsed]: Due service of the within demurrer is hereby admitted this 18th day of Aug., 1911.

PUTER & QUINN,
Attorneys for Plaintiff.

Filed August 18, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. [11]

*In the Superior Court of the County of Humboldt,
State of California.*

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation, and THOMAS E.
ATKINSON,

Defendants.

**Demurrer [of Metropolitan Redwood Lumber
Company].**

Now comes Metropolitan Redwood Lumber Company, one of the defendants herein, and demurs to plaintiff's complaint herein upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

II.

That there is a misjoinder of parties defendant herein in this, that each defendant herein is joined to each of the other defendants herein, and that no ground for such joinder is shown.

III.

That several causes of action have been improperly united, to wit, a cause of action against defendant Metropolitan Redwood Lumber Company, and a cause of action against defendant Thomas E. Atkinson.

WHEREFORE defendant prays to be hence dismissed.

OTTO C. GREGOR and
MAHAN & MAHAN,
Attorneys for said Defendant.

[Endorsed]: Due service of the within demurrer is hereby admitted this 20th day of July, 1911.

PUTER & QUINN,
Attorneys for the Plaintiff.

Filed Jul. 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. [12]

Summons.

*In the Superior Court of the County of Humboldt,
State of California.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY (a Corporation) and THOMAS E.
ATKINSON,

Defendants.

Action brought in the Superior Court of the County
of Humboldt, State of California, and the Com-
plaint filed in the Office of the Clerk of said
County of Humboldt.

PUTER & QUINN,
Attorneys for Plaintiff.

The People of the State of California Send Greeting
to Metropolitan Redwood Lumber Company (a
Corporation) and Thomas E. Atkinson, Defend-
ants.

YOU ARE HEREBY DIRECTED TO APPEAR
and answer the Complaint in action entitled as
above, brought against you in the Superior Court of
the County of Humboldt, State of California, within
ten days after the service on you of this Summons.
if served within this county or within thirty days if
served elsewhere.

And you are hereby notified that unless you
appear and answer as above required, the said plain-
tiff will take judgment for any money or damages
demanded in the Complaint, as arising upon contract,

or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and the seal of the Superior Court of the County of Humboldt, State of California, this 27th day of June, A. D. 1911.

[Seal]

GEO. W. COUSINS,

Clerk.

By I. H. Cousins,

Deputy Clerk. [13]

Sheriff's Office,

County of,

State of California,—ss.

I HEREBY CERTIFY that I received the within Summons on the 29th day of June, A. D. 1911, and personally served the same upon Thomas E. Atkinson, managing agent for the company, a corporation, by delivering to and leaving with Thomas E. Atkinson the managing agent of said Metropolitan Lumber Company, a corporation, in the County of Humboldt, State of California, on the 30th day of June, A. D. 1911, a copy of said Summons; and that the copy Summons so delivered to and left with said Thomas E. Atkinson as managing agent of said defendant corporation, was attached to a copy of the Complaint in said action.

Dated at Rio Dell, this 30th day of June, A. D. 1911.

R. A. REDMOND,

Sheriff.

By Lloyd Brown,

Deputy Sheriff.

Sheriff's Fees, \$.

[Endorsed]: Filed July 3, 1911. Geo. W. Cousins,
Clerk. By I. H. Cousins, Deputy Clerk.

Office of the Sheriff

Of the County of Humboldt.

I hereby certify that I received the within Summons on the 29th day of June, 1911, and personally served the same on the 30th day of June, 1911, Thomas E. Atkinson being one of the defendants named in said summons, by delivering to said defendant, personally, in the County of Humboldt, State of California, a copy of said Summons, and a true and correct copy of the complaint in the action named in said Summons attached to said copy of Summons.

Dated this 30 day of June, 1911.

E. A. REDMOND,
Sheriff.

By Lloyd Brown,
Deputy Sheriff. [14]

*In the Superior Court of the County of Humboldt,
State of California.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY (a Corporation) and THOMAS E. AT-
KINSON,

Defendants.

Complaint.

Now comes the plaintiff complaining against de-

endants, and for cause of action alleges:

I.

That the said defendant the Metropolitan Redwood Lumber Company is now, and at all times hereafter mentioned has been, a corporation duly formed, organized and existing under and by virtue of the laws of the State of Michigan, and has its principal place of business in the city of Eureka, county of Humboldt, State of California.

II.

That said defendant Thomas E. Atkinson is now, and at all times herein mentioned was, the General Superintendent and Manager of said defendant corporation, the Metropolitan Redwood Lumber Company.

III.

That on or about the 15th day of August, 1910, and for a long time prior thereto, the defendants conducted logging operations on lands near Howe Creek, in said County of Humboldt, State of California; that said logging operations consisted in cutting down or felling redwood and fir trees, converting the same into sawlogs and hauling or dragging said sawlogs by means of a wire cable attached to a steam engine, otherwise known as a Compound Yarder Donkey, to a landing from which said sawlogs were transported by a railroad to a sawmill to be manufactured into lumber. That said cable was about one and one-quarter inches in diameter, and used for the purpose of [15] hauling or dragging one sawlog at a time over and along the road or dragway to the said landing, a distance

of about four hundred yards. That said road or dragway conformed to the lay of the land and has two straight courses, to wit: the said road or dragway ran in a straight course from said landing, a distance of about three hundred feet, and then turned at about a right angle pursuing said last course to the point where the logs were hauled from; that at the point or angle on said road or dragway where said two straight courses meet, there was placed a "Tommy Moore" fastened to a large stump by means of a wire rope called a "Tommy Moore strap"; that said "Tommy Moore" consists of a large iron or steel block containing a swivel and weighing about 600 pounds. That said "Tommy Moore" was so placed for the purpose of keeping said cable in position, and was at all the times herein mentioned, used for that purpose. That said cable passed through the said "Tommy Moore" around the swivel therein contained and was thereby held in proper position. That said "Tommy Moore strap" consisted of a wire rope about one inch in diameter, and about 30 feet in length, the two ends of said wire rope being fastened to the "Tommy Moore" and the loop of said wire rope was placed over and around a redwood stump located on the side of said road or dragway opposite the point thereon where said "Tommy Moore" was placed as aforesaid.

IV.

That on or about the month of April, 1910, plaintiff was employed by defendant as a "chaser" on said road or dragway, and that plaintiff's duties under such employment were to take charge of said

“Tommy Moore”; to tend said cable and signal the engineer who had charge of said Compound Yarder Donkey when to stop and when to start said engine, while said sawlog was being hauled or dragged over and along said road or dragway to the said landing. That in the performance of said duties, the plaintiff was compelled to stand near the [16] said stump, around which the said “strap” was fastened as aforesaid, in order to tend said “Tommy Moore” and said cable and to give the said signals to the said engineer; that in order to give the said signals as aforesaid, it was necessary for the plaintiff to stand in a position in plain sight of the said engineer, and at a point on or near said road or dragway where plaintiff could have a plain view of both of said courses of said road or dragway.

V.

That the said “Tommy Moore strap” was so carelessly and negligently made and constructed by the said defendants that the said “Tommy Moore strap” at the time the plaintiff was injured by the breaking of said “Tommy Moore strap” as hereafter alleged was dangerous to use and operate in holding and keeping said “Tommy Moore” in place, and in that behalf plaintiff alleges: that said defendants carelessly and negligently made and constructed said “Tommy Moore strap” out of an old rusty, badly worn cable, about one inch in diameter, that did not have the tensile strength sufficient to hold the said “Tommy Moore” in place, while said sawlogs were being hauled or dragged as aforesaid.

VI.

That common ordinary care and reasonable care and prudence required and demanded that said "Tommy Moore strap" should be made and constructed of wire rope having sufficient tensile strength to hold said "Tommy Moore" in place and withstand the strain thereon while said sawlog was being hauled or dragged along said road or dragway as aforesaid.

VII.

That said defendants carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore strap" as aforesaid, and on the 15th day of August, 1910, and at all times herein mentioned, said "Tommy Moore strap" was in an unsafe, dangerous and defective condition.
[17]

VIII.

That said defendants so carelessly and negligently made, constructed, kept and maintained said "Tommy Moore strap" as aforesaid, that the same was, on the 15th day of August, 1910, and for a long time prior thereto, in an unsafe, defective and dangerous condition, in this, that the said "Tommy Moore strap" was made out of an old, badly worn, weak, rusty cable about one inch in diameter, that did not have or possess sufficient tensile strength to withstand the strain thereon, when said "Tommy Moore" was being used as aforesaid, and had no means of protection to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said

“Tommy Moore strap” should give way or break.

IX.

That said “Tommy Moore strap” was on the 15th day of August, 1910, and for a long time prior thereto had been, in the aforesaid defective, dangerous and unsafe condition. That the defendants knew of the said unsuitable, defective, dangerous and unsafe condition of said “Tommy Moore strap” as aforesaid, or might have known of the same by the exercise of ordinary care and diligence; but the said defendants carelessly and negligently permitted and suffered the same to remain in said unsuitable, defective, dangerous and unsafe condition and provided and maintained the same in said unsuitable, defective, dangerous and unsafe condition for the use as aforesaid, on said 15th day of August, 1910, and during all the times herein mentioned. That on the said 15th day of August, 1910, and while said “Tommy Moore strap” was in said unsafe, dangerous and defective condition, the plaintiff was engaged in performing the duties for which he was employed as aforesaid, and while so engaged and while working within about 20 feet of said “Tommy Moore,” the said “Tommy Moore strap” broke by reason of the said unsafe, dangerous [18] and defective condition thereof, and struck plaintiff on the right hip and leg, thereby crushing and breaking the bones of said hip and leg and cutting, lacerating, bruising and injuring said hip and leg.

X.

That the *the* time of receiving said injury, and prior thereto, said plaintiff was an able-bodied man,

sound in limb and in good health, capable of doing manual labor in any capacity, and earning an income from said labor averaging eighty dollars per month; and by reason of said injury as aforesaid, plaintiff is permanently prevented from following his usual vocation and his earning capacity has been greatly reduced.

XI.

That by reason of said injury aforesaid, plaintiff's right hip and leg have become greatly impaired and injured, and as plaintiff is informed and believes, and therefore states the fact to be, that by reason of said injury the said hip and leg will always be weak and impaired, and that said leg, by reason of said injury, is now and always will be about two inches shorter than it was before said injury as aforesaid, and plaintiff will always be and remain a cripple by reason of said injury.

XII.

That as a result of said injury, which plaintiff hereby alleges to be permanent, plaintiff has suffered, and now suffers, great mental and physical pain and agony; and is now, and will be for the remainder of his life, greatly incapacitated from earning a livelihood, his right hip and leg permanently injured and weakened to his damage in the sum of Twenty-five Thousand Dollars.

WHEREFORE plaintiff demands judgment against defendant for the sum of Twenty-five Thousand Dollars, and for costs of suit herein expended.

PUTER & QUINN,
Attorneys for Plaintiff. [19]

State of California,
County of Humboldt,—ss.

Hugh Davis, being first duly sworn, deposes and says: That he is the plaintiff named in the above-entitled action; that he has heard read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HUGH DAVIS.

Subscribed and sworn to before me, this 27th day of June, 1911.

[Seal]

L. F. PUTER,

Notary Public in and for the County of Humboldt,
State of California.

[Endorsed]: Filed June 27th, 1911. Geo. W. Cousins, Clerk. By I. H. Cousins, Deputy Clerk.
[20]

State of California,
County of Humboldt,—ss.

I, Geo. W. Cousins, County Clerk of the County of Humboldt, State of California, and ex-officio Clerk of the Superior Court in and for said Humboldt County (which is a court of record), do hereby certify that the foregoing are full, true and correct copies of the Original Complaint, Summons and service thereof, Demurrer of Metropolitan Redwood Lumber Company, Demurrer of Thomas E. Atkinson, Petition for Removal of Cause on the Ground

No. 15,390.

HUGH DAVIS

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY et al.

Order Sustaining Demurrers.

Now comes the plaintiff and confesses the demurrers to the complaint, and it is ordered that said demurrers be sustained, with leave to plaintiff to amend within twenty days. [22]

*In the Circuit Court of the United States, Ninth
Circuit, Northern District of California.*

TRANSFERRED FROM THE SUPERIOR
COURT OF THE COUNTY OF HUM-
BOLDT, STATE OF CALIFORNIA.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Amended Complaint.

Now comes plaintiff in the above-entitled cause, by permission of this Court first had and obtained, files this his Amended Complaint, and for cause of action alleges:

I.

That the said defendant, The Metropolitan Redwood Lumber Company, is now, and at all times

hereafter mentioned has been, a corporation duly formed, organized and existing under and by virtue of the laws of the State of Michigan, and has its principal place of business in the city of Eureka, County of Humboldt, State of California.

II.

That on or about the 15th day of August, 1910, and for a long time prior thereto, the defendant conducted logging operations on lands near Howe Creek in said County of Humboldt, State of California; that said logging operations consisted in cutting down or felling redwood and fir trees, converting the same into sawlogs and hauling or dragging said sawlogs, by means of a wire cable attached to a steam engine, otherwise known as a Compound Yarder Donkey, [23] to a landing from which said sawlogs were transported by a railroad to a sawmill to be manufactured into lumber. That said cable was about one and one-quarter inches in diameter, and used for the purpose of hauling or dragging one sawlog at a time over and along the road or dragway to the said landing, a distance of about four hundred yards. That said road or dragway conformed to the lay of the land and has two straight courses, to wit, the said road or dragway ran in a straight course from said landing, a distance of about three hundred feet, and then turned at a right angle pursuing said last course to the point where the logs were hauled from; that at the point or angle on said road or dragway where said two straight courses meet, there was placed a "Tommy Moore" fastened to a large stump by means of a wire rope called a

“Tommy Moore strap”; that said “Tommy Moore” consists of a large iron or steel block containing a swivel and weighing about 600 pounds. That said “Tommy Moore” was so placed for the purpose of keeping said cable in position, and was at all the times herein mentioned, used for that purpose. That said cable passed through the said “Tommy Moore” around the swivel therein contained, and was thereby held in proper position. That said “Tommy Moore strap” consisted of a wire rope about one inch in diameter, and about 30 feet in length, the two ends of said wire rope being fastened to the “Tommy Moore” and the loop of said wire rope was placed over and around a redwood stump located on the side of said road or dragway opposite the point thereon where said “Tommy Moore” was placed as aforesaid.

III.

That on or about the month of May, 1910, plaintiff was employed by defendant as a “chaser” on said road or dragway, and that plaintiff’s duties under such employment were to take charge of said “Tommy Moore”; to tend said cable and signal to the engineer who had charge of the said Compound Yard Donkey when to stop and when to [24] start said engine, while said sawlog was being hauled or dragged over and along said road or dragway to the said landing. That in the performance of said duties, the plaintiff was compelled to stand near the said stump, around which the said “strap” was fastened as aforesaid, in order to tend said “Tommy Moore” and said cable and to give the said signal

to the said engineer; that in order to give the said signals as aforesaid, it was necessary for the plaintiff to stand in a position in plain sight of the engineer, and at a point on or near said road or dragway where plaintiff could have a plain view of both of said courses of said road or dragway.

IV.

That the said "Tommy Moore strap" was so carelessly and negligently made and constructed by the said defendant, that the said "Tommy Moore strap" at the time the plaintiff was injured by the breaking of said "Tommy Moore strap" as hereafter alleged was dangerous to use and operate in holding and keeping said "Tommy Moore" in place, and in that behalf plaintiff alleges that said defendant carelessly and negligently made and constructed said "Tommy Moore strap" out of an old, rusty, badly worn cable, about one inch in diameter, that did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said sawlogs were being hauled or dragged as aforesaid.

V.

That common ordinary care and reasonable care and prudence required and demanded that said "Tommy Moore strap" should be made and constructed of wire rope having sufficient tensile strength to hold said "Tommy Moore" in place and withstand the strain thereon while said sawlog was being hauled or dragged along said road or dragway as aforesaid.

VI.

That said defendant carelessly and negligently

failed and [25] neglected to provide and maintain a safe and suitable "Tommy Moore strap" as aforesaid, and on the 15th day of August, 1910, and at all times herein mentioned, said "Tommy Moore strap" was in an unsafe, dangerous and defective condition.

VII.

That said defendant so carelessly and negligently made, constructed, kept and maintained said "Tommy Moore strap" as aforesaid that the same was, on the 15th day of August, 1910, and for a long time prior thereto, in an unsafe, defective and dangerous condition, in this that the said "Tommy Moore strap" was made out of an old, badly worn, weak, rusty cable about one inch in diameter, that did not have or possess sufficient tensile strength to withstand the strain thereon, when said "Tommy Moore" was being used as aforesaid, and had no means of protection to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said "Tommy Moore strap" should give way or break.

VIII.

That said "Tommy Moore strap" was, on the 15th day of August, 1910, and for a long time prior thereto had been, in the aforesaid defective, dangerous and unsafe condition. That the defendant knew of the said unsuitable, defective, dangerous and unsafe condition of said "Tommy Moore strap" as aforesaid, or might have known of the same by the exercise of ordinary care and diligence; but the said defendant carelessly and negligently permitted and

suffered the same to remain in said unsuitable, defective, dangerous and unsafe condition and provided and maintained the same in said unsuitable, defective, dangerous and unsafe condition for the use as aforesaid, on said 15th day of August, 1910, and during all the times herein mentioned. That on the said 15th day of August, 1910, and while said "Tommy Moore strap" was in said unsafe, dangerous and defective condition [26] the plaintiff was engaged in performing the duties for which he was employed as aforesaid, and while so engaged and while working within about 20 feet of said "Tommy Moore," the said "Tommy Moore strap" broke by reason of the said unsafe, dangerous and defective condition thereof, and struck plaintiff on the right hip and leg, thereby crushing and breaking the bones of said hip and leg and cutting, lacerating, bruising and injuring said hip and leg.

IX.

That at the time of receiving said injury and prior thereto, said plaintiff was an able-bodied man, sound in limb and in good health, capable of doing manual labor in any capacity, and earning an income from said labor averaging eighty dollars per month; and by reason of said injury as aforesaid, plaintiff is permanently prevented from following his usual vocation and his earning capacity has been greatly reduced.

X.

That by reason of said injury aforesaid, plaintiff's right hip and leg have become greatly impaired and injured, and as plaintiff is informed and believes,

and therefore states the fact to be, that by reason of said injury the said hip and leg will always be weak and impaired, and that said leg, by reason of said injury, is now, and always will be, about two inches shorter than it was before said injury as aforesaid, and plaintiff will always be and remain a cripple by reason of said injury.

XI.

That as a result of said injury, which plaintiff hereby alleges to be permanent, plaintiff has suffered and now suffers great mental and physical pain and agony; and is now and will be for the remainder of his life greatly incapacitated from earning a livelihood, his right hip and leg permanently injured and weakened to his damage in the sum of Twenty-five Thousand Dollars. [27]

WHEREFORE, plaintiff demands judgment against defendant for the sum of Twenty-five Thousand Dollars, and for costs of suit herein expended.

PUTER & QUINN,
Attorneys for Plaintiff.

State of California,
County of Humboldt,—ss.

Hugh Davis, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing Amended Complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HUGH DAVIS.

32 *Metropolitan Redwood Lumber Company*

Subscribed and sworn to before me this 8th day
of December, 1911.

Y. F. PUTER,
Notary Public in and for the County of Humboldt,
State of California.

Due service of the within Amended Complaint is
hereby admitted this 8th day of December, 1911.

O. C. GREGOR and
MAHAN & MAHAN,
Attorneys for Plaintiff.

[Endorsed]: Filed December 11, 1911. Southard
Hoffman, Clerk. [28]

*In the District Court of the United States, Ninth
Circuit, Northern District of California, 2d
Division.*

TRANSFERRED FROM THE SUPERIOR
COURT OF THE COUNTY OF HUM-
BOLDT, STATE OF CALIFORNIA.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Demurrer to Amended Complaint.

Now comes the defendant above named and files
this its Demurrer to the Amended Complaint of
plaintiff herein, and for grounds of Demurrer allege:

That said complaint does not state facts sufficient

to constitute a cause of action.

That the alleged cause of action set forth in said Amended Complaint is barred by the provisions of Subdivision 3 of Section 340 of the Code of Civil Procedure of the State of California.

WHEREFORE defendant prays to be hence dismissed with its costs herein expended.

MAHAN & MAHAN,
OTTO C. GREGOR,
LILIENTHAL, McKINSTRY and RAY-
MOND,

Attorneys for Defendant.

Service of the within admitted this 8th day of January, 1912.

PUTER & QUINN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 10, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

At a stated term, to wit, the November term, A. D. 1911, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 19th day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, designated to hold and holding this court.

No. 15,390.

HUGH DAVIS,

vs.

METROPOLITAN REDWOOD LUMBER CO.

Order Overruling Demurrer to Amended Complaint.

Upon motion of counsel for plaintiff, and it appearing that the attorneys for the defendant do not object thereto, it is ordered that the defendant's demurrer to amended complaint be and the same is hereby overruled, with leave to defendant to answer within 20 days. [30]

*In the Circuit Court of the United States, Ninth
Circuit, Northern District of California.*

TRANSFERRED FROM THE SUPERIOR
COURT OF THE COUNTY OF HUM-
BOLDT, STATE OF CALIFORNIA.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Answer to Amended Complaint.

Now comes the above-named defendant, and for its Answer to the Amended Complaint of plaintiff on file herein,

Denies, that the "Tommy Moore strap" mentioned in the said Amended Complaint consisted of a wire

rope about one inch in diameter, and avers that said "Tommy Moore strap" was $1\frac{1}{4}$ inches in diameter, and denies that said "Tommy Moore strap" was so or otherwise carelessly or negligently made or constructed by said defendant, or that said "Tommy Moore strap" at the time plaintiff was injured, or at any other time or at all, was dangerous to use or operate in holding or keeping said "Tommy Moore" in place or otherwise, or that said defendant carelessly or negligently made or constructed said "Tommy Moore strap" out of an old, rusty or badly worn cable about one inch in diameter, or that said "Tommy Moore strap" did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said sawlogs were being hauled or dragged as alleged, and in this behalf avers, that said "Tommy Moore strap" was about $1\frac{1}{4}$ inches in diameter, well fitted and adapted for the purpose for which the same was used, and that defendant used ordinary and reasonable care in the selection of the same. [31]

Denies that said defendant carelessly or negligently failed or neglected to provide or maintain a safe and suitable "Tommy Moore strap" as aforesaid, or that on the 15th day of August, 1910, or at any other time or at all, said "Tommy Moore strap" was in an unsafe, dangerous or defective condition.

And denies that said defendant so or otherwise carelessly or negligently made, constructed, kept or maintained said "Tommy Moore strap" as aforesaid, that the same was on the 15th day of August, 1910, or for a long time prior thereto, or at any time

or at all, in an unsafe, defective or dangerous condition in this, that the said "Tommy Moore strap" was made out of an old, badly worn, weak or rusty cable, about one inch in diameter, or did not have or possess sufficient tensile strength to with stand the strain thereon when said "Tommy Moore" was being used as aforesaid, or at any other time, or otherwise, or at all, or that reasonable or ordinary care required defendant to furnish means of protection, to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said "Tommy Moore strap" should give way or break.

And denies that said "Tommy Moore strap" was, on the 15th day of August, 1910, or for a long time prior thereto, or for any time at all, had been in the aforesaid or other defective, dangerous or unsafe condition, or that the defendant knew of the alleged unsuitable, defective, dangerous or unsafe condition of said "Tommy Moore strap" aforesaid, or otherwise or at all, or might or could have known of the same by the exercise of ordinary care and diligence.

And denies that said defendant carelessly or negligently permitted or suffered the said "Tommy Moore strap" to remain in said or any unsuitable, defective, dangerous or unsafe condition, or provided or maintained the same in said or any unsuitable, defective, dangerous or unsafe condition for the use as aforesaid on the 15th [32] day of August, 1910, or at any time mentioned in said Amended Complaint, or at all.

That as to the allegations following, to wit:

“That on the said 15th day of August, 1910, and while said ‘Tommy Moore strap’ was in said unsafe, dangerous and defective condition, the plaintiff was engaged in performing the duties for which he was employed as aforesaid, and while so engaged and while working within about 20 feet of said ‘Tommy Moore,’ the said ‘Tommy Moore strap’ broke by reason of the said unsafe, dangerous and defective condition thereof, and struck plaintiff on the right hip and leg, thereby crushing and breaking the bones of said hip and leg and cutting, lacerating, bruising and injuring said hip and leg,”

defendant has no information or belief on the subject of said allegation, and placing its denial upon that ground, denies that on the said 15th day of August, 1910, or while said “Tommy Moore strap” was in said or any unsafe, dangerous or defective condition, the plaintiff was engaged in performing the duties for which he was employed as aforesaid, or while so engaged or while working within about twenty feet of said “Tommy Moore” the said “Tommy Moore strap” broke by reason of the said or any unsafe, dangerous or defective condition thereof, or struck plaintiff on the right hip or leg, thereby crushing or breaking the bones of said hip or leg, or cutting, lacerating, bruising or injuring said hip or leg.

That as to allegation in paragraph numbered “IX” in said Amended Complaint, defendant has no information or belief sufficient to enable it to answer said allegation, and basing its denial upon that

ground, denies that at the time of receiving said injuries, or prior thereto, plaintiff was an able-bodied man, sound in limb or in good health, or capable of doing manual labor in every capacity, or earning an income from said labor averaging \$80.00 per month, or that [33] by reason of said or any injury as aforesaid, or otherwise, plaintiff is permanently prevented from following his usual vocation or his earning capacity has been greatly reduced.

That as to allegation in paragraph numbered "X" of said Amended Complaint, defendant has no information or belief upon the subject of said allegation sufficient to enable it to answer the same, and basing its denial upon that ground denies that by reason of said or any injury aforesaid, plaintiff's right hip or leg had become greatly impaired or injured, or that by reason of said or any injury the said hip or leg will always be weak or impaired, or that said leg, by reason of said or any injury, is now or always will be about two inches shorter than it was before said or any injury as aforesaid, or shorter at all, or that plaintiff will always be or remain a cripple by reason of said injury or otherwise.

And denies that as a result of said injury or otherwise, plaintiff is now, or will be for the remainder of his life, greatly incapacitated from earning a livelihood, or his right hip or leg permanently injured or weakened, to his damage in the sum of Twenty-five Thousand Dollars, or in any sum whatever.

And defendant denies that in the performance of the duty or duties of plaintiff, plaintiff was compelled to stand near the said stump around which the

said strap was fastened as aforesaid, in order to tend said "Tommy Moore" or said cable, or to give the said or any signal to the said engineer, and denies that in order to give the said or any signal as aforesaid, or otherwise, it was necessary for plaintiff to stand in a position in plain sight of the said engineer or at a point on or near said road or dragway where plaintiff could have a plain view of both of said crosses of said road or dragway.

And defendant, for a further and separate answer and defense herein, avers that the injury alleged to have been suffered by [34] plaintiff were the result of the risks of the business in which said plaintiff was engaged at the time he suffered the injuries complained of.

And for a further and separate answer and defense herein the defendant avers that the injuries alleged to have been suffered by plaintiff were the result of plaintiff's own carelessness and negligence.

And for a further and separate answer and defense herein, defendant alleges, upon information and belief, that the injuries alleged to have been suffered by plaintiff were occasioned and caused by the negligence and carelessness of a fellow-servant of said plaintiff, then in the employ of the defendant and engaged in the same general business and particular occupation as and with said plaintiff.

And for a further and separate answer and defense herein, defendant alleges that the negligence and carelessness of the said plaintiff directly contributed to and were the approximate causes of the said injuries alleged to have been suffered by plain-

tiff, in that and because the said plaintiff before and upon the 15th day of August, 1910, well knew and was thoroughly familiar with the kind and character of the work at which he was then employed, and well knew the acts and duties he was required to perform under the terms of his said employment, and well knew and was thoroughly familiar with the danger of receiving injury while in the position and place he was in at the time of said injury, and well knew that said place was a dangerous place for him to be in, but that said plaintiff so negligently and carelessly conducted himself in and about and concerning his said employment, and in and about and concerning the means and method of performing or attempting to perform the same, that he received the injuries complained of, and in behalf of this defendant avers, that had said plaintiff used ordinary care and caution in the [35] performance of his duties and had he used ordinary care and caution in protecting and looking after his own safety, he would not have received or suffered the or any injuries complained of in said Amended Complaint.

WHEREFORE, defendant having fully answered plaintiff's Amended Complaint, prays to be hence dismissed with its costs herein expended.

MAHAN & MAHAN,
OTTO C. GREGOR,
LILIENTHAL McKINSTRY and RAY-
MOND,

Attorneys for Defendant.

State of California,
County of Humboldt,—ss.

Thomas G. Atkinson, being first duly sworn, deposes and says that he is President of the Metropolitan Redwood Lumber Company, a corporation, the defendant named in the above-entitled action, that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

THOMAS G. ATKINSON.

Subscribed and sworn to before me this 16th day of March, 1912.

[Seal]

L. E. MAHAN,

Notary Public in and for the County of Humboldt,
State of California.

Due service of the within Answer to Amended Complaint is hereby admitted this 16th day of March, 1912, and within the time stipulated.

PUTER & QUINN,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 21, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

*In the District Court of the United States for the
Northern District of California.*

#15,390.

HUGH DAVIS

vs.

THE METROPOLITAN REDWOOD LUMBER
COMPANY.

Verdict.

We, the jury, find in favor of the plaintiff, and
assess the damages in the sum of Ten Thousand Dol-
lars (\$10,000).

A. W. ERICSON,
Foreman.

AXEL SUNDQUIST.

LEWIS H. LEE.

JAS. WILSON.

ELMER L. DEVLIN.

D. W. McGOWAN.

MARTIN S. CLAUSSEN.

C. O. LINCOLN.

ABRAHAM LARSEN.

WILLIAM W. TURNER.

MURDOCK MCGILVRAY.

ALBERT D. ROBERTS.

[Endorsed]: Filed July 25, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [37]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,390.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause having come on regularly for trial on the 23d day of July, 1912, being a day in the July, 1912, Term of said Court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein; Messrs. Puter & Quinn appearing at attorneys for the plaintiff, and Messrs. Mahan & Mahan and Kenneth Newett, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on the 24th and 25th days of July, all in said year and term, and evidence, oral and documentary, upon behalf of the respective parties, having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages in the sum of Ten Thousand Dollars (\$10,000). A. W. Ericson, Foreman; Axel

Sundquist, Lewis H. Lee, Jas. Wilson, Elmer L. Devlin, D. W. McGowan, Martin S. Clausen, C. O. Lincoln, Abraham Larsen, William W. Turner, Murdoch McGillvary, Albert D. Roberts," and the Court having ordered that judgment be entered in accordance with said verdict and for costs: [38]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Hugh Davis, plaintiff, do have and recover of and from Metropolitan Redwood Lumber Company, a corporation, defendant, the sum of Ten Thousand (\$10,000) Dollars, together with his costs in this behalf expended, taxed at \$——.

Judgment entered July 25, 1912.

[Seal]

JAS. P. BROWN,
Clerk.

By Francis Krull,
Deputy Clerk.

A true copy attest.

JAS. P. BROWN,
Clerk.

By Francis Krull,
Deputy Clerk.

[Endorsed]: Filed July 25, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,390.

HUGH DAVIS

vs.

METROPOLITAN REDWOOD LUMBER CO.
et al.

Certificate to Judgment-roll.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court,
this 25th day of July, 1912.

[Seal]

JAS. P. BROWN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed July 25th, 1912. Jas. P.
Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[40]

[**Notice of Bill of Exceptions.**]

*In the District Court of the United States, Northern
District of California, Second Division.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

To the Plaintiff Above Named and to Messrs. Puter
and Quinn, His Attorneys:

Defendant hereby presents the following proposed
Bill of Exceptions as hereunto annexed, to be used
upon a Writ of Error sued by the defendant herein
to the above-entitled court from the United States
Circuit Court of Appeals for the Ninth Judicial Cir-
cuit.

OTTO C. GREGOR,
MAHAN & MAHAN,
KENNETH NEWETT, Jr., and
LILIENTHAL, McKINSTRY & RAY-
MOND,

Attorneys for Defendant and Plaintiff in Error.

[41]

*In the District Court of the United States, Northern
District of California, Second Division.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Bill of Exceptions of Defendant.

Be it remembered that the above-entitled cause came on regularly for trial before the above-entitled court, sitting at Eureka, California, on the 23d day of July, 1912, the Honorable John J. De Haven presiding as Judge thereof, and the jury duly impanelled to try the said cause, Messrs. Puter and Quinn appearing as attorneys for the plaintiff, and Messrs. Mahan and Mahan and Kenneth Newett, Jr., appearing as attorneys for the defendant, and thereon the following proceedings were had and taken on said trial:

[Testimony of W. C. Elsemore, for Plaintiff.]

W. C. ELSEMORE, sworn for plaintiff, testified on direct examination as follows:

I am a resident of the county of Humboldt, a civil engineer by profession. I have made a diagram of a portion of the territory on the south bank of the Eel River, opposite the Metropolitan Mill, which shows the location of where this alleged accident took place, which this suit is the outgrowth of. I have the diagram with me.

(Testimony of W. C. Elsemore.)

(Witness places map on blackboard, a copy of which is hereto attached as exhibit "A.")

(Witness resumes testimony:) The line on the left of the diagram, the furtherest line to the [42] left of the diagram, represents a section of the railroad running up the gulch; the yellow band represents the log road or skid road by which the logs are hauled off the hill. With reference to the yellow strip, the hill is all up to the right. This road marked "Log Road," in yellow, is thirty feet from the railroad track about the point where this stump, "Tommy Moore" stump is. The elevation of the log road at the stump is $11 \frac{1}{10}$ feet higher than the railroad track. At the point opposite the stump marked "24.7" the elevation of the road is $12 \frac{6}{10}$ feet. At the point opposite the stump marked "37.6" the elevation of the skid road is 37.6 feet above the railroad track. I don't know how high the stump marked "Elevation 28.6" is above the railroad track opposite it upon the left. I didn't count from that. It is 28.6 above the railroad opposite what is called the "Tommy Moore" stump. The elevation of the stump here marked "24.7," the stump on the left is $24 \frac{7}{10}$ feet above the railroad track. The elevation of the stump marked "Elevation 15," marked "3 foot stump," is 15 feet above the railroad track opposite the "Tommy Moore" stump. The width of the skid road as I scaled it along here is about 8 feet. The diameter of the "Tommy Moore" stump is about 6 feet. The diameter of these stumps as drawn here upon the map, is in proportion to the

(Testimony of W. C. Elsemore.)

width of the road as given upon the map. I endeavored to give just the size as they appear upon the ground there. Everything is marked on the map on a scale of ten feet to the inch. The distance between the "Tommy Moore" stump and the place called the donkey site is 238 feet. The distance from the "Tommy Moore" stump to the point marked "Elevation 58.0," on the skid road up the hill is 184 feet. The distance from the "Tommy Moore" stump to the stump marked "37.6 elevation" and marked "8½ feet diameter" at a point of elevation is 99.8 feet.

On cross-examination the witness testified: I don't know whether this absolutely correctly represents the scene of the injury in this case. I know nothing about that. I was [43] taken by Mr. Puter to this place and asked to make certain measurements in directions which were pointed out. Other than that I know nothing about it. He pointed out a stump to me and told me to measure from that point to another point, pointed out those places and asked me to give elevations and so on, and I did as requested. That is all I know about this. The surface above here is in general the uneven surface that you find in the logging woods; that is to say, the elevation of this stump is fifteen feet above the railroad. I don't mean to say that that ground there is exactly fifteen feet above the railroad, some may be twelve feet, some eleven feet; this roadway running to what is called the donkey site is practically on a uniform grade from the "Tommy Moore" stump to the don-

(Testimony of W. C. Elsemore.)

key site. I will say that this old skid road that we took the measurements of along here is practically upon a uniform grade from this point marked "donkey site" to the "Tommy Moore" stump. Speaking of the country on either side of the road, the country on either side, except where it has been made into a logging road, is in an uneven condition, as it is uneven in the logging woods. There are hillocks and depressions in this country along here on each side of the road. I did not measure the distance from the stump. I did not put down the measurement of the diameter of the stump. It is eight feet or somewhere along there. These measurements of elevation were taken from the top of the stump. I have given the elevation of the ground opposite the stump, 11.1 feet, and the elevation on the stump is 14.6. I think there is three or four feet difference there between the elevation of the ground and stump marked "3 feet" on map. This does not represent the elevation of the ground at the point indicated right at the stump. There is nothing at all to indicate the height of the various stumps. The distance between the stump to which that "Tommy Moore" strap is fastened and the opposite side of the skid road is somewhere about twelve feet. [44] The side nearest the logging road to the opposite side of the logging road is about twelve feet. The land at this point begins to raise up. It is a raise to the top of the hill. I do not know what per cent grade is at that point. I did not take various positions here to see how far I could see in the direction Mr. Puter indicated that the log road

(Testimony of W. C. Elsemore.)

ran. The only position I had was on top of this stump ("Tommy Moore" stump). All these distances and elevations were taken from the top of the stump with one sitting of the instrument. I did not stand away to see how far I could see down this way. If a man was standing at the point marked with an "x," I am not able to tell how far he could see down this road. I would judge he could see around to here (shows). If you stood at a point 30 or 35 feet from the stump you could not see very far down there. I don't know just how the country lays there. I have an idea how the land is there. I don't know exactly the particular point. It was the general character of logging woods, different elevations. I did not notice any other road when we were there. I had my position all the time upon the top of the stump. That is the only skid road I noticed. I would say this was a manufactured skid road. I took an elevation 184 feet from the "Tommy Moore" stump. I stood on the stump and took the elevation, and remained there. I did not examine to see whether there were any other roads running off in various directions up the hill or down the hill.

[Testimony of Dr. W. J. Quinn, for Plaintiff.]

Dr. W. J. QUINN, sworn for plaintiff, on direct examination testified as follows:

My name is William J. Quinn. I am a physician. I have been practicing my profession since 1905, seven years; in Humboldt County six years. In my professional capacity I was called to administer to

(Testimony of Dr. W. J. Quinn.)

the plaintiff, Hugh Davis, in this action. I remember the occasion of that call. When Mr. Davis got hurt I was in the country and came in upon the train, and naturally when I got off the train and saw the ambulance [45] there I went over to see who was hurt, and I found it was Mr. Davis. So I went up right after Mr. Davis to the hospital. I went up after they took him there. I said I would be right up there at the hospital as soon as he was. It was the Union Labor Hospital. When *I about* the train, I meant the Eel River train. I saw the ambulance there and I said, "I will meet you when you get up there." I was at the hospital right after that and saw him. I made an examination of his condition. I took him in the emergency dressing-room we have there and there was a splint on him and bandages and the blood was oozing through above the bandage; and I took all those off and the bone was protruding out through the muscle and skin and everything. The bone was protruding from the lower third, I think, of the leg between the knee and ankle. It would be right here (shows), closer to the knee than the ankle, within the third; I can't remember exactly. It was above the ankle joint. There was also a fracture of the thigh about the middle third of the same leg. It was his right leg. I found a compound fracture of the leg about a quarter way above the ankle and the bone of the leg was protruding right out. You could take his foot and pull it right around upon the side the bone was sticking out. Through the flesh and muscles and everything else, and there

(Testimony of Dr. W. J. Quinn.)

was quite a lot of hemorrhage in the flesh. The muscles were lacerated and torn. I looked at it and I told Mr. Davis it might be that one of the main arteries was cut in two and he would have gangrene in part of his foot, but that did not happen. When we find a compound fracture as bad as that it is liable to occur, but it did not occur. There was a second fracture between the hip and knee, about the middle. That was not a compound fracture, but it was a pretty bad fracture. Any fracture above the knee we consider bad, because it is a fracture that is very hard to put an appliance on to keep it there. [46] The splints would necessarily hold this fracture would be opposite to this one down here, and that makes it bad. The leg was cleaned out and a moist antiseptic dressing kept upon that leg. We don't ever do very much to it other than to let those legs run for awhile, and see how much infection there was. We always figure on infection. We leave them until we get rid of the infection before we do anything with the bone. We pull the bone straight, straighten the leg, and upon the outside of the dressing we put a retention splint, you might say. Well, I worked with the case two weeks. I saw him for all of two weeks, and the first of September I left there and went east. When I came back the leg was set. During those two weeks I did nothing except the dressing was kept on there. When his temperature went down and there was no infection in it, some time in September, I think, they went to work and fixed the leg. That was September, 1910. I was with him

(Testimony of Dr. W. J. Quinn.)

two weeks, and when I came back from the east I took care of it and dressed it. I came back from the east on the 20th of October, 1910. From that time on I took care of him and dressed his injuries. He remained in the hospital up to about two months ago. During that entire period I would dress the wound every day. After I came back from the east and took care of him, it was necessary, I think, to scrape the bone three different times. I might be possibly mistaken, either three or four times, I think three. It kept running pus from both places; the break by the thigh and also down near the foot. I used anesthetics when I scraped it. He would be put under ether or chloroform. Then we would cut down to the bone and scrape off a little bit of the bone that was rough and leave it wide open and let it fill in itself. For this break above the knee, plates were used to assist the bone so it would knit naturally. I did not see those plates put on, but I took them out. Of those that I took out, they were put on the side; here we had a piece of flat steel about six or [47] seven inches long, and probably a third of an inch wide, and there was six or eight screw holes and we put a screw right through that, and we took a drill like you would drill in to a board, and drilled down in the bone a ways and then got that in proper place and screwed the screws right down through it in that way. There was one plate put on up there and then a staple, that is driven in. It is very sharp, you know, put it on the bone and took a hammer and drove it in. He has got a leg that will be pretty

(Testimony of Dr. W. J. Quinn.)

useful to him, but still he will always be lame; that is sure. It is shorter. I have not measured it; I should say about three inches. These wounds have practically healed up. What little comes there I don't think there is any injury to him. Lots of times in a bone fracture you expect a little oozing of pus every once in awhile. There is a place on his leg now that we will have to skin graft before it will heal up. It is a space as big as a dollar, that the skin has never grown over. The knee is stiff. This wound above the knee has not thoroughly healed over yet. At times it breaks out again. Well, of course, it is lots better now than it has ever been. It is still in a condition where it is not healed up; it might be and it might not. It might not break out again and it might.

[Testimony of Hugh Davis, in His Own Behalf.]

HUGH DAVIS, sworn for plaintiff, on direct examination testified as follows:

I am the plaintiff in this action. I was born in Ireland. I am about twenty-seven years old. I came to this country in January, 1905. In 1910 I went to work for the defendant, the first of April. I went out a swamper, at two dollars a day. I worked at that four days. Then I was moved up into the rigging, and I was pulling rigging there for about a month, and he paid me two dollars and a half a day. Then they started up logging and he sent me up as chaser. He told me to go up chasing with McArthur. Mr. Spain told me to. He was the foreman in the woods for the defendant company. That is not the

(Testimony of Hugh Davis.)

same gulch that [48] I was injured on; that was another place. I put in the month of April for two dollars and a half; then he raised my wages the next month, and I worked up there until the last days of July. I went to work over in the place where I was hurt. The foreman, Mr. Spain, sent me up there then. He put me then to work as a chaser at the place where I was hurt. I worked there not quite two weeks before I was hurt. I was receiving three dollars a day wages. I have seen the diagram. I understand the diagram. The point down here (shows) is where the donkey was. The log is coming down this way (shows). This is the log road. It was quite steep down the dragway the logs come. Right here it was lower; it was a little lower than it was up here. It was up near that upper stump. They would haul the logs down the hill with the donkey here, and they had a big cable that ran up this way, about an inch and a quarter cable. And this is the "Tommy Moore" stump here where this block was hung on to. This was the "Tommy Moore." The "Tommy Moore" was located about the middle of the skid road, not quite the middle but very near it, very near one side of the skid road on the side nearest the stump, the road the logs had to come down. I had to stand about here (shows). I had to stand ten or twelve feet from the stump. My duty was to watch the log as it came as far as here (shows), about one hundred and twenty feet from the stump. I never measured it, but it was about that. When the log came down to here about one hundred and

(Testimony of Hugh Davis.)

twenty feet from the stump then I had to take care of it, stand about twelve feet from the "Tommy Moore" and be in sight so I could signal the engineer and at the same time see the log and see the engineer at the same time. As the log came along down to where the "Tommy Moore" was, I had them slack the line about three or four feet and unhook this block and hooked it on the side, and that would bring it to the landing here. My main duty was to give signals. I had them let the line out and I put it on the log here, up this way [49] (shows), and at the same time see the donkey engineer down here. If I stood further away than twelve feet, I could not see the log and the engineer, because there was an elevation coming up here, there was a big stump here. Right here (shows). That stump is marked there. There was a big hill, pretty high, you could not see anything up there. In other words, I could not see from the skid road coming down the hill, upon this road, the landing side at all. There was a big hill. It was a sort of gulch or slight depression where the skid road came down the hill. If I stood away further than twelve feet I could not see the log; I might as well not be there at all. I could see the engineer at the same time. There was no other place where I could have stood and have seen the log and the engineer and performed my duties than the place where I did stand. You could not see it any other place. This stump was in the way here, and the hill, and the elevation was going up like that. If I stood here at any place, the hill was up here, and there was a

(Testimony of Hugh Davis.)

deep hole here, a gulch that water ran into. I never measured the landing here above the railroad track and landing, but it ought to be fourteen or fifteen feet high. There was a gulch in here between the track and the log road, between the track and the elevation where the roadbed was.

Q. Were you told to go by Mr. Spain and where to work?

A. Yes, sir; I was told by Mr. Spain that I belonged here at this place.

Q. Do you remember the incident of his telling you that? A. Yes, sir.

Q. Go on and state just what he told you.

Mr. NEWETT.—That is objected to as incompetent, irrelevant and immaterial, and not proper under the issues raised by the complaint.

The COURT.—I think I will allow that question.
[50]

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 1.

A. He told me one day—the log came down—when it got as far as here of course that log got foul. There was those stumps there, and I went up to change the choker, sometimes the log will go over and I have got to change the choker up there. I went to change it and the rest of the bunch on top of the hill halloed if I was alive yet. They kept halloing, those boys, that I had made half a day's delay; what was the matter. So the engineer got the signal from them and he went ahead with the log and he pulled it

(Testimony of Hugh Davis.)

right into the "Tommy Moore" and upset the "Tommy Moore," and it delayed us all of fifteen minutes or so getting out of that. I went down after this log and Spain was down there and he said, "What is the matter? Don't you know that the engineer could not see that log? That is what you are there for. I sent you here and here you belong."

Q. What did he mean by that?

A. He told me to stand there and watch the log. When the log came to this spot here where I had to change it, to give him the signal to stop, because the engineer could not see unless I gave him the signal.

Q. He told you—that was before the accident, of course? A. Yes, sir.

Q. He told you that was the place for you to stand where you could see the log and give the signal?

A. Yes, sir; see the log and give the signal to the engineer at the same time.

Mr. NEWETT.—I move to strike the answer to that last question out, upon the same grounds that I objected to the last question.

The COURT.—I will deny the motion.

To which ruling defendant then and there duly excepted. [51]

DEFENDANT'S EXCEPTION NO. 2.

(Witness resumes:) At the time of the accident I was standing here about twelve feet from the stump watching my certain portion that I had to take care of, because the log had to get about one hundred and twenty feet from me first. My work was one hundred and twenty feet from the stump, up this way.

(Testimony of Hugh Davis.)

Then men that were further up the hill who had charge of the log above my section could signal to the engineer to start or stop. From where they were, they could signal by a wire and whistle. They had a wire that ran up to them, and when the log got out of their section, that is over the elevation at this point where the upper stump was, then it got into my section. They could not see the log. From there on I took care of it. At the time the accident took place, I was standing twelve feet from the stump watching on my portion whenever the log would come along, to be right there. I could not see the log in their part, but I had to watch all the time after it came in to my part to see that it would not get unhooked or anything, and if it did get unhooked to hook it again. When this accident happened, the log was not in my section. I was watching for it to come in to my section. Then the strap broke. The strap that was around the stump, the "Tommy Moore" strap on this side, and it threw it around and hit my leg while standing off about twelve feet away. I was taken from there. I was packed from there down to the landing when they came down from the hill. I was sent in upon the train to the hospital. The other doctors up there they chloroformed me right up there and washed the blood out and sent me right on the train to the hospital. It was the 15th day of August, 1910, that I went to the hospital. I was in the hospital from the 15th day of August, 1910, until about eleven weeks ago, I think; somewhere around there. I came out about eleven weeks ago.

(Testimony of Hugh Davis.)

I was there in the hospital [52] for over a year and a half. I was six times under chloroform in the hospital, and one time out at the camp. The last time I was put under chloroform in reference to my leg was about five months ago or six months ago. That leg is shorter than the other leg. It is more than three inches shorter, anyway, maybe more. I don't know how much it is shorter. That leg is shorter than the other. I can't walk straight. If I take this shoe off you can see it. I took this heel clean off this shoe, and raised the heel to that high level, and I had to fill it up on the inside, or I could not walk at all. I have not the use of my knee. That is all that I can bend it (showing). The knee is stiff. The break up there (thigh) is not completely healed over yet. It breaks out there every four or five or six weeks; then it runs about two or three weeks, and then I don't have it for four or five weeks. Before I met with the accident this leg was sound. It was always a sound leg. I was in perfect health. I was receiving three dollars a day for the work I was doing. (Plaintiff exhibited the leg to the jury.)

On cross-examination the witness testified: It was the end of the cable that struck me. After it hit me I was conscious. If I had been standing fifteen feet away, I don't know if it would have struck me. It was the end of the line that struck me. It broke on the opposite side and swung around. It was the end of it hit me, but I don't know how near it was to the end of the line. It was something like two feet or three feet. If I stood further away than twelve

(Testimony of Hugh Davis.)

feet, I would not have been struck at all, but I could not see there. If I stood there I could not do my work.

(Plaintiff here admitted his signature to the verification of the original complaint herein and the following portion of said complaint and verification were received in evidence:)

Subscribed and sworn to before L. F. Puter, Notary Public. "That while so engaged and working within about twenty feet of said 'Tommy [53] Moore,' the said 'Tommy Moore' strap broke by reason of the said unsafe condition."

(The witness resumed:)

Q. What made you change it from about twenty feet to twelve feet in your amended complaint?

A. I could not tell the distance at that time. I got hit so badly at that time I did not know where I was standing until I went up and looked at it again. A line coming like that and knocking you out, you could not tell the spot either.

Q. When did you go out and size it up?

A. We were out there about a week ago, or maybe two weeks ago.

Q. About two weeks ago?

A. A week ago or somewhere around there, and we were out there before that.

Q. When were you out there before that?

A. That was about three weeks ago.

Q. You did say at this time you were working within twenty feet of the "Tommy Moore"?

A. About that, about that distance; I did not say

(Testimony of Hugh Davis.)

it was exactly.

Q. Well, did you know exactly where you were standing when you went out there three weeks ago?

A. Well, I had a better idea that I was standing there. I knew what I had to take care of and I knew that was the place when I went out, that was the distance I was when I went out. If a man asked you where you were hurt you would not know where you were to a minute.

(Witness resumes:) I was going downhill when they picked me up. I was knocked to a position somewhere around here (shows). The exact location was about twelve feet. It might be twelve, it might be fourteen feet, or something like that, I never measured it off to an inch. I never thought I would get hurt or anything else. **I have been working [54]** in the woods two or three months most every season. I worked in 1906. I think I worked about two months. In 1907 I did not work at all. In 1908 I worked from May, as near as I can tell, until August in the woods. In 1909 I worked—well, about three or four months. In 1910 I worked from April until I got hurt. All the time I had with the rigging crew was in the year of 1910 until I got hurt. That was the only year I worked with the rigging crew and the only time I worked as chaser was in 1910. The only time I worked with the rigging crew was in 1910. I started in about the first of April, 1910, with the rigging crew and worked until I got hurt. From the first of April until the 15th of August I was continually working with the rigging crew. I

(Testimony of Hugh Davis.)

was with different crews, but I continued working with the rigging crew. I was working as chaser from the first of May and until the 15th day of August I was a chaser. My duty was to watch the log through the "Tommy Moore," through the "Tommy Moore" block, and signal to the engineer, signal the engineer to go ahead as soon as I changed it over. There was no oiling to the "Tommy Moore," only what little bit the crew put on it. Anybody could do it. Sometimes I would oil it and sometimes the hook-tender, anyone that would be near it maybe once in two days. Anybody could oil it. I swore in my complaint that it was my duty to attend the "Tommy Moore." I was the oiler who oiled it. That particular strap that broke was in use, I think, about nine days, nine or ten days before the day of the accident, but we were not working more than half of the time; it wasn't more than half the time. In about fifteen days it worked eight or nine days. I don't know how many logs a day I pulled in through that "Tommy Moore." I never counted [55] them. I don't think from fifty to one hundred a day. They may have pulled in some days twenty, some days thirty, some days **they would not** pull in ten. According to how they got the logs. Every log that came in I went to the "Tommy Moore" and took that tag line and hooked on the choker and sent it down to the railroad cars. That happened to every log that came in while I was working there. The strap was around the stump. I was right at the stump. I saw the strap the first

(Testimony of Hugh Davis.)

day I was there. I saw the strap every day and every time a log came along, but I did not take any notice. I did not look at it to see whether it was defective. I do not know whether that strap was defective or not. I know who made that strap. Two fellows by the name of Carey and Laird. That is all the persons I know of. I did not see the strap made. I know they made it. They say they made it. They were members of the crew I was working with. I do not know what they made it out of. I don't know where they got the cable to make it. Well, it was made out of material they got from the company. It was kept there, what the company furnished and the members of the crew selected from that material and made the strap. I suppose it was under the orders of the foreman, of the hook-tender. Well, I never made any "Tommy Moore" strap. I saw it after it was made. It is a line; they took a line and put eye splices in each end and put it in there. Mr. Atkinson is the general superintendent of the company. The foreman told me to take this position. Now, he told me after I had gone down the road and at that time was attending to a foul line when he told me that I had no business there, that my business was around this side of the [56] stump. He told me that I was to be down here to give the signal; the engineer could not see me when I was up above. He said, "Why aren't you down here?" He told me my place was here. He said, "Down here you belong." That was because I had to give the signal to the engineer and watch the log

(Testimony of Hugh Davis.)

at the same time. He pointed out a position down here for me to occupy. The position where I can give the signal to the engineer whenever that log would be coming down to the "Tommy Moore." He said, "I want you down here; I want you here by the 'Tommy Moore.' You can't give the signal up there." I said, "I had to go up there to fix up the log there." He said, "You have no business on that side of the 'Tommy Moore.'" The fellows above halloed out to me what was the delay, what delayed me, and they gave the signal, and I ran on down before the log to stop it before it got to the "Tommy Moore," but the log got down ahead of me and tangled up the "Tommy Moore," and Spain said, "What is the matter here? You have to come down here. You ought to know the engineer can't see the log if you ain't down here to give the signal. Ain't that what you are here for?" He told me my place was on this side of the stump. Mr. Spain did not warn me against standing too close to that stump. He never warned me about standing too close to that stump. He did tell me my position was on this side (side towards engine). Now, on this side, occupying this position, I can see directly down to the engineer. At any point along here I can see pretty well. That is a fact, I can see at any point along here. I was out there showing them how the things were situated. I was out with Mr. Puter and Mr. Elsemore. Now, as a matter of fact, there are roads or indications of old roads running off this way,

(Testimony of Hugh Davis.)

roads running all kinds of ways. Those roads go right across bringing in trees or logs, sometimes at this point, sometimes from here, [57] and sometimes from there. There are signs of roads, quite a number of them, running all through the woods in every direction. I used one road at the time I was employed there. At the time I got hurt, that was the main line when I got hurt. There was a road came around the other way. At the time I got hurt they were logging off the hill but they had changed off that road. Of course, there was no skid road picked out for them until they picked the road themselves. They built the road themselves. There was all kinds of indications where the logs had been drawn. They only changed the line two or three times in two weeks. This line had stayed in that situation. They took the logs from up fifteen or sixteen yards both sides of that and pulled it with a line in to that certain chute, and they pulled along the chute. I was not out there for a year and a half, in that neighborhood. After I got out there I found the conditions changed. There was a good deal of growth over the road, undergrowth, and weeds grown up. They had not been using that particular logging territory for a long time. It was just the same any more than there was some brush grown up. There are roads that run in different directions from this. The old road took that course. At one time that road did go around this stump here, before they changed it to this other road. There was a road going up the side hill before that. This was the sec-

(Testimony of Hugh Davis.)

ond road. There were two roads. This one and another road. The other road was over this way. This logging road here has no certain width. There was no width; the log makes its own road and they are different widths. I had to be in that position to do my work. I took it because Spain told me to and because I had to be there anyway, for both of those reasons. If Spain had not told me to, I would have taken that position anyway. I took that position before [58] Spain told me at all. When I was with the other crew, working at the same work between April and August, I had nearly the same character of work that I did at this time. It was very near the same duty, but it was in a different position where I had to stand. I was then attending the "Tommy Moore." I was acting as chaser in that position before. That lasted for about three months. During that time the log chain was drawn through every day, thirty or forty a day. I saw the strap every day; the "Tommy Moore" strap was present in front of my eyes, and the strap that caused the injury was present in front of my eyes every day. It was there but I did not pay any particular attention to it. I didn't take any particular notice of it. I could have examined it if I wanted to. I thought there was no need of it. I had no experience in lines. I could have examined it if I wanted to; there was nothing to keep me from examining the "Tommy Moore" strap used there. I didn't know it needed examining; in the first place, I did not know anything about

(Testimony of Hugh Davis.)

it. There was no reason why I could not have examined it if I had wanted to. I did not examine it. I did not know whether it was rusty. I did not know what size it was or anything about it. I could not do my work, I could not see the engineer if I stood in the bight of the cable. It was not my place to stand there anyway. If the line would break or anything would fly I would be in danger. I don't know if the line was apt to break. It might break. I could not stand there and do my work anyway. It might not break, but it wasn't my place, I could not do my work if I stood there. I have seen the main line break out in the woods. I don't know how it came to break. It must be old or something. I don't know how it came to break. I have known of it. The line drawing in logs. The main line [59] broke. On this day, at the time I was hurt, the following were with me there: the hook-tender, his name was Gordon, and a fellow named Mike Carey and Mr. Laird, and the engineer, his name was Brunius, Tom Brunius. The whistle boy was up in the woods. That composed the whole crew. The hook-tender had charge of the crew. That was Gordon. He was supposed to have charge of the crew; that is what I heard everyone say. He was under Spain the foreman. I never knew of a "Tommy Moore" strap breaking before. Never knew of one. Spain never told me to keep away; he never told me any such thing.

On redirect examination the witness testified: The hook-tender, Gordon, had charge of the crew that

(Testimony of Hugh Davis.)

was working there the date of that accident. This crew consisted of the engineer, who was at the donkey, and myself and the men that were up on the hill that got out the logs, and fastened the log on to the cable. None of the other members of the crew were near that stump at that time. Their duties kept them away from that part of the road on top of the hill. The engineer was at his engine. The hook-tender is sometimes called the chain tender in the woods. He is the boss of the crew that is working with him. I never made a "Tommy Moore" strap. I never was there when this strap was made at all. I had nothing to do with the handling of it at all. I never put the "Tommy Moore" strap upon the stump. I never fixed the "Tommy Moore" strap at all. I had nothing to do with the placing of the "Tommy Moore" strap and nothing to do with this particular strap that broke.

On recross-examination the witness testified: There was another member of that immediate crew, the loader. He was there and he was loading on the landing. My duty was to attend to the "Tommy Moore." That "Tommy Moore" [60] consists of a block and is fastened to this stump through which the main cable runs.

On further redirect examination the witness testified: My duties were not confined to this "Tommy Moore"; the principal part of my duty was to signal. I was to signal to the engineer and attend to the "Tommy Moore," too.

[Testimony of Paul Laird, for Plaintiff.]

PAUL LAIRD, sworn for plaintiff, testified on direct examination: I was born in Virginia. I have been in Humboldt County off and on for about five years. I am twenty-five years old. Well, I have been in the State Engineering Department for five months. I was employed by the defendant the Metropolitan Lumber Company during the summer of 1910. I am acquainted with the defendant Mr. Davis in this action. He was employed there at that time. I remember the incident of the accident that injured Mr. Davis. At and immediately prior to that time I was choking logs. That means putting chains around the logs in the woods; getting them so they can be fastened on to the main cable. I remember the location of the "Tommy Moore" that was used at the time of this accident. I saw that strap before I had occasion to have something to do with making that strap that was used on that "Tommy Moore." I could not say exactly how long before the accident that strap was made; it had not had a great deal of use; it had been made quite a while, but it had not been used much. **It was approximately two or three weeks.** Two other fellows and myself made that strap. They were Mike Carey and a man by the name—I don't know exactly what his name was, but we called him Romeo. The hook-tender instructed us to make that strap. [61]

Mr. PUTER.—What was his name?

Mr. NEWETT.—I object to the question and move that it be stricken out as incompetent, irrele-

(Testimony of Paul Laird.)

vant and immaterial and outside the issue.

The COURT.—I shall allow it to go.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 3.

(Witness resumed:) His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of.

Mr. NEWETT.—I move that that be stricken out on the same ground.

The COURT.—I will deny the motion.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 4.

(Witness resumes:) He pointed it out to us. He told us to cut enough out of it to make a strap for the "Tommy Moore," and showed us the cable. I and these other gentlemen cut the strap off, cut off a piece, rather, from this cable and we made the strap.

Mr. PUTER.—Will you go on and state the condition of that cable, the condition the cable was in when you made the strap out of it, the condition of the piece of cable that you made the strap of?

A. Well, it was a very poor piece of line, in my estimation.

Mr. NEWETT.—I interpose an objection to this on the same ground, incompetent, irrelevant and immaterial, and outside of the issues in this case.

The COURT.—I will overrule the objection.

(Testimony of Paul Laird.)

To which ruling defendant then and there duly excepted. [62]

DEFENDANT'S EXCEPTION NO. 5.

(Witness resumes:) It was worn; you could tell by looking at it even, and without handling the line any at all, you could tell it was worn; in the first place, it was small. I should not think that it was big enough to be used for a strap for a "Tommy Moore" from what I know about them. I should judge it was an inch and an eighth line in diameter, or it had been. The strands were worn. The strands would break off, when we would go to push them in through the wire, they would break; the wire strands would break and fly back when we pulled the line through. I went on and helped to splice the line, with these other two gentlemen. It showed indications of being worn out. I had much difficulty in making that splice. After we had made it we took the strap to the stump and put it on the "Tommy Moore" and put it around the stump and connected it on to the "Tommy Moore."

Mr. PUTER.—Q. After you had made this strap and before the accident, did you have any conversation with the hook-tender Mr. Gordon in reference to the strap?

Mr. NEWETT.—Objected to as incompetent, irrelevant, immaterial and hearsay.

The COURT.—Objection overruled.

To which ruling defendant then and there duly excepted.

(Testimony of Paul Laird.)

DEFENDANT'S EXCEPTION NO. 6.

A. I did.

Q. State what it was.

A. He said the line was not fit to be used as a strap; he wanted to get a piece off the new line on the donkey to make the strap out of; that is what he told me.

Q. Did he give you the reason, did he state to you why he was [63] not permitted to use the new line?

A. Well, this line we used was not fit to be used, he said.

Mr. NEWETT.—I object to it as incompetent, irrelevant, immaterial and hearsay.

The COURT.—Overruled.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 7.

Q. Go on and state what he said about that.

A. Well, in our conversation, whatever it was, I don't distinctly remember at present, he said he wanted to get a new piece out of the new line, but they would not stand for it; they said use the old line, the old line was good enough. He didn't say who it was.

Q. Did he tell you who said that?

Mr. NEWETT.—We object to it as incompetent, irrelevant and immaterial.

The COURT.—I will sustain the objection to that.

Mr. NEWETT.—We move that the last answer be

(Testimony of Paul Laird.)

stricken out as incompetent, immaterial, irrelevant and not responsive to the question.

Mr. PUTER.—What Mr. Gordon said?

Mr. NEWETT.—Yes.

The COURT.—I will deny the motion.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 8.

(The witness resumed:) At the time this accident occurred I was up in the woods working. I was working up here at the upper end that day, getting the logs out. This road came down the hill at right angles on the day of the accident, as compared with the landing. In other words, [64] it was right straight up the hill from the stump. I do not think a person could act in the capacity the plaintiff was and stand in any other place, except at the stump. There was no other place where he could stand and see up the road, so as to see the log, and at the same time see the engineer, unless he crossed the gulch and stood on the other side of the railroad. There is a deep gulch there, some seventeen or eighteen feet deep. He could not stand anywhere around here and get close enough to see the log and the engineer. There was a back line on that stump. The back line is a small line that pulls the main line back in the woods and is held in position on top of that stump by a block. It ran through a block. When they haul the cable back in the woods, they fasten a small line on the cable to pull it back in the woods

(Testimony of Paul Laird.)

with. That small line was on top of the stump. It was not possible for a person to stand on top of the stump on account of the back line cable and the block it went through there.

On cross-examination the witness testified:

Cross-examination by L. E. MAHAN.

Gordon was the boss of the particular crew in which the plaintiff was working at that time. He had charge of the work there, and when a "Tommy Moore" strap was constructed, it was his duty to make one. He got the material from material that was around there. He was told to get this strap. I do not know except what he told me. I was not with him when he was ordered to get the "Tommy Moore" strap, but I was with him nearly every evening, or every other evening after work, and he told me. It was made after the Tacoma donkey went to work; we put the new donkey in before we went to work. It was made before it went to work. The new donkey was there. I could not say how many feet of cable there was that came with that new donkey. I don't know [65] how many feet came with it. The main line used with the donkey is the line that came with it. When they undertook to roll this new cable on the drum, it was found that it was so long that quite a bit could not be put upon the drum and had to be cut off. I don't know, but what I think about it, I think there was some line cut off, where it was I could not tell you. I know there was some line cut off. It was left in that neighborhood. That

(Testimony of Paul Laird.)

was exactly the same line that was used to draw the logs from the woods. It was the same line used on the donkey. Gordon was the boss of that crew. He was the one that directed me and the others together to make this strap, and we went to work and instead of using this piece that was cut off from the main line, he used this line I spoke of, because he was told to. He did not use a piece of the main cable. Where the line out of which the strap was made came from, I could not say; it came from a line that was around an old stump; there was about forty or fifty feet of line. It was around a stump; that is all I know. There was a cable upon a donkey known as the "half-breed" donkey. I don't know what size it was; it wasn't as big as that was upon the new donkey, but what size it was I could not say exactly. I think it was about an inch and an eighth in diameter. I know as a fact that when this line has been used to some extent, it stretches. An inch and a quarter draws into an inch and an eighth. At the time Mr. Gordon told me to cut that line, I could not say on which side of the railroad track I was standing. Previous to going to work upon the new donkey I worked upon the donkey known as the "half-breed." As near as I can remember, Gordon told us to get that old line off that stump that was behind the "half-breed" on the other side of the track and make a strap out of it. He told the chaser and I was to help him. I don't know who the chaser was; I don't know his name. I did not take the [66]

(Testimony of Paul Laird.)

strap from the coil on the "half-breed" donkey, the drum.

On redirect examination the witness testified: I had not used that line around the stump upon the donkey.

[Testimony of Michael Carey, for Plaintiff.]

MICHAEL CAREY, sworn for plaintiff and direct examination, testified:

I was born in Ireland. I have been in this country six years. I am thirty years old. I was working for the defendant the Metropolitan Lumber Company during the month of August, 1910. I remember the incident of the plaintiff Mr. Davis getting hurt there. On the day, and immediately prior to the time that he got hurt, I was on the rigging; I was choking the logs. I was working up on the hill getting the logs out, so they could be hauled to the landing. I remember the strap that held the "Tommy Moore" in position, that was being used at the time the plaintiff got hurt. I am familiar with that strap. I assisted in the making of that strap about two weeks before the accident. The chain-tender told me to make that strap. His name was Gordon. A fellow named Mr. Laird assisted in making that strap; also Romy Weldon. Mr. Gordon, the hook-tender, told me where to get the cable to make the strap. He told us to make a strap and cut that out, and showed us what piece to take. He marked off the particular piece of the cable that was to be cut. The cable we used was thrown around a stump. It was across from the landing that the

(Testimony of Michael Carey.)

plaintiff got hurt on, across the railroad. He went and showed us this piece of cable, old cable, and instructed me and the other men to go to work and make this "Tommy Moore" strap out of it, and showed us where to cut it off. I assisted in cutting the cable off and assisted in making the strap and splicing it and so on. The cable was in poor condition. The cable was worn out. We had trouble splicing [67] it. We could not pull the strands through; it was all chipped and broken off, on account of the worn condition. It was rusted out. After I made this strap I assisted in putting it around the stump and fastening it on to the "Tommy Moore." I was working with the crew up on the hill getting the logs out on that day. I helped get out the log that was on the cable when the "Tommy Moore" strap broke. I remember the incident of the strap breaking. The log at that time that was being hauled was about one hundred feet from the top. It was being pulled towards the brow of the hill. The log was upon the runway when this strap broke. I did not see anything interrupting the log or striking stumps or anything of that kind. When the strap broke there was nothing in front of the log at the time. It was in the roadbed. I am familiar with the place where Mr. Davis stood. At the time of the accident Mr. Davis could not have stood in any other place and have been able to see the log coming down the hill and at the same time see the engineer whom he was to give signals to. He could not stand in any other place except by that stump, about fifteen feet

(Testimony of Michael Carey.)

from the stump. If he went beyond that he could not see up that road. I helped get him out after he was hurt. He was on the landing at the time and we packed him down when I got down.

On cross-examination the witness testified: At the time the rope broke the log was out, I should think, between seven and eight hundred feet. There is a whistle-boy that stands at this end, and his duty is to warn the engineer at this end, and he follows it, this boy, until the cable chaser takes it. The whistle-boy follows it up to give signals. He gets signals from the men who stand between the "Tommy Moore" and the log. There are whistle-men along here. We give him signals and he gives them to the man at the station. It was his duty to take [68] the signals here and to repeat them to the engineer. The log is going along this road. Then, when it comes to the "Tommy Moore," it stops and the line is taken out of the "Tommy Moore." Then, the main line attaches on to the end of the log; and it at once swings it around until it goes a direct course for the donkey. In doing that it wears a roadway here. It will form a hard roadway. The logs will not go down directly, so this space here was all worn away by logs so that a man standing twenty feet here or thirty feet, could look a considerable distance from there. He could see probably one hundred feet or two hundred. Gordon was the foreman of that crew, and he had full charge. It was his duty to make these straps when they broke or when they were needed and he could go and take any material he

(Testimony of Michael Carey.)

could find that was sufficient for that purpose. I remember when the Tacoma donkey came there, the new Tacoma donkey. I am referring to the one that was in use at the time this injury happened. I remember when that came. That came a couple of weeks before the injury. Fourteen hundred feet of new rope or new cable came with that. I remember that when they put it on the drum they could not get it all on. Probably four or five hundred feet were cut off, because it could not be got on the drum. That remained around upon the landing. That "Tommy Moore" strap could have been made out of that if it was necessary. If Gordon had wanted to he could have made it out of that piece of new line. It was there and could have been used. I don't think the whistle-boy standing at this end could see all the way to the bottom. When the log starts in the woods the men in the woods follow it or watch it until it gets down to where somebody else takes it, to see that everything goes right and that it does not get foul; if it gets foul they go down and release it. Just as soon as it gets foul they signal to the whistle-boy. He in turn sends the word to the engineer. [69] This log had started about 100 feet when this broke. It had about five or six hundred feet to go until it reached the "Tommy Moore." I had practically started this log going in. The chasers are supposed to stand there, even when that log was six or seven hundred feet in the woods, to attend to his duties, which is when the log comes up to change it. He stays there until the log comes there to change it.

(Testimony of Michael Carey.)

When the log came to the "Tommy Moore," it was his duty to unhook the tag line and let it go outside. You can stay any place and see the engineer—that is the man he was to signal to. Perhaps he could see the tag line from anywhere in one hundred feet; he could not see this line here and the log going in to the tag line at the "Tommy Moore" any place from the landing to there, but he could not see up. He had to see up two hundred feet from the "Tommy Moore," to see if it gets foul. If it gets foul he knows it by the tension upon the line, and if the hook comes off or the choker comes off he knows it by the slacking of the line. The rest of that crew follow the log down all the time to see if anything goes wrong, and if anything goes wrong they immediately signaled the boy and he signaled the engineer to stop. You can follow the log all the time until the other man can take it up with his eye. The line was running through the "Tommy Moore" block. The log had to go through there. If he saw the log approaching the "Tommy Moore," the engineer would stop it instantly as soon as he gave the signal. If he stood back here forty feet and saw when the log got to the "Tommy Moore," he could not see far enough. He could see the "Tommy Moore" forty feet away from it. When he stood forty feet from the stump there was a big pitch to come over there within one hundred feet of him. I never stood there to look to see how far I could see. I could stand here and see that stump. I could not stand here and see that stump. I never tried. He [70] could not stand here

(Testimony of Michael Carey.)

(showing); that is the only place to be, by the "Tommy Moore." He could not see his work anywhere else. His work was to attend to the "Tommy Moore." He could see the "Tommy Moore" any place from the landing to that stump. He could see to do his duty any place from the landing to that stump, but he could not see any further up. He had to see up two hundred feet or three hundred feet. We had to look out for ourselves above here.

On redirect examination the witness testified: In reference to the point that I worked at in the woods, the position I had, I could see the log a certain ways upon its course to the bottom here, to the "Tommy Moore" here, then the log passes out of my sight; then the person at the "Tommy Moore" had to look after it from the time it came into view of the man at the "Tommy Moore." I did not make any measurements of how far that would be when it got out of view. I could not see the whole way to the "Tommy Moore." He could not stand forty feet away and see 200 feet up the road.

[Testimony of Tom Breunius, for Plaintiff.]

TOM BREUNIUS, sworn for plaintiff testified on direct examination:

My name is Tom Breunius. I reside at Stitz Creek, Scotia, Humboldt County. I have been in this country going on three years now. I am an engineer. I was in the employ of the Metropolitan Redwood Lumber Company during the month of August, 1910. I was donkey-driver. I was a mem-

(Testimony of Tom Breunius.)

ber of the crew of which Mr. Davis was one. Mr. Spain was foreman of that crew at that time. A man by the name of Gordon had charge of that crew there. He was the hook-tender. I remember the occasion of the injury to Mr. Davis. I was working there that day. Now, this diagram represents, this yellow line represents the roadway or landing, and this point here is where the donkey was. This is the railroad. This represents the stump where the "Tommy Moore" was fastened. I had been working a couple of weeks, not over that, with that engine before the accident. We were pulling; as far as I know [71] the diagram is right, almost at right angles, what they call a square pull. This point right across the roadway from the stump is quite a steep precipice. This roadway turned up between the runway coming down here and the runway coming down to the landing. This part was almost level (shows); this part was quite a grade (shows). I could not see across there from these two places at all. You would have to be very close to that stump in order to be able to look up the driveway and at the same time to be able to see me. He would have to be within twelve or fourteen feet of the stump, something like that, in order to look up to see the log as it was coming, as it came over the first declivity that brought the log in sight of the chaser. He had to be where he could watch it all the time. There was no other wire and no way of signaling me except to do it at that point. He naturally had to be there. The cable that was then being used upon the day of

(Testimony of Tom Breunius.)

the accident was practically a new cable, an inch and a quarter in diameter. I was not there when they put it on, but you could see and I know it was a brand new cable, just as good as a brand new cable. It had never been used before, that is the main line, the line they haul the logs in with. It was a good inch and a quarter cable. The engine figured about eighty horse-power. The gearings increased the horse-power. It was what they call a compound gear machine. Now, the horse-power of that engine is thirty-three thousand pounds, lifted a foot in a minute. The cylinder capacity of the engine would figure out eighty horse-power and it was sixteen to one. I never stopped to figure out exactly what strain the engine could put upon the cable. In plain English it was a very powerful engine. It would break one of those cables at times, and according to the wire companies that manufacture that kind of cable, they claim that cable will stand about seventy-two tons strain. The comparative strain on the cable fastening the "Tommy Moore" to that stump on the day of the accident, taking into consideration the right angled haul or pull, is considered twice the purchase [72] on one single wire of that strap as upon the main line. But, of course, the strap being doubled, we have two parts, therefore on one part of the strap there would be the same strain as upon the main line. In other words, if the strap was of the same size and the same tensile strength as the main line, one way doubled around that stump would offset the power of the main line. In other words, the

(Testimony of Tom Breunius.)

two strands there—provided it had the same tensile strength, if it had no inequality of binding where it could throw the power more on one strand than the other. The reason for that difference was the angle pulling through the block, through this big block. I remember the incident of the breaking of the strap. At that time we were hauling logs. It was a brand new machine and it had not been working very extra good, one part of it, but this particular day it was doing all right. It was giving a pretty fair pull then, although nowhere near what it ought to have done. When this accident happened it was an ordinary pull. The log did not run against anything, that is what they told me. We were pulling ordinarily when that gave away. Mr. Davis' duty was as the log approached this "Tommy Moore," what we call the lead, you know, of course, the log would not go through that; the cable runs through this block. The log would not go through that, so they had to stop and unhook and hook it on the other side to bring the log in. It was part of his duty to keep track of the log after it came in his vision along this road, and he had charge of it from that time. That is about a hundred and forty or a hundred and fifty feet until it got to the donkey. His position was to stay where he could see the log coming down the hill and at the same time see me at my position here. He could not stand very far away and see the log coming down. He might possibly have gone down upon the railroad track and seen, but it was too far away; that location is there on this side. He could hardly

(Testimony of Tom Breunius.)

see up from down there, I don't think. He could not [73] be on top of the stump, either. There was a block on top of the stump. That is where the back line was. He had to be within twelve or fourteen feet of that stump, anyway, to do his work as chaser. A platform might have been built out towards the railroad track and run back there, and he could have been in a safer position that way. But there was no platform built there and this was eleven or twelve feet higher; the railroad track is down eleven or twelve feet lower than the roadbed at that point.

On cross-examination by Mr. NEWETT, the witness testified:

Well, we all know what the duties of a man taking that position is. Gordon was the hook-tender, what we called the boss. He was the boss over me.

**[Testimony of Hugh Davis in His Own Behalf
(Recalled).]**

HUGH DAVIS, recalled for plaintiff, testified on direct examination:

All this occurred in this county and State.

(It is admitted that the defendant is a corporation.)

Thereupon plaintiff rested.

Defendant thereupon made a motion for a nonsuit.

Mr. NEWETT.—At this time I desire to move for a nonsuit in this case upon the ground that the evidence is not sufficient to justify a verdict in behalf of the plaintiff under the pleadings in this case. And I desire to call the Court's attention to what I deem

to be a fatal variance between the pleadings and the proof, if that is shown; for the further reason, that under the law the plaintiff assumes the risks of his employment and the injury occurred by reason of one of the assumed risks, and that he is guilty of contributory negligence; and that the injury was occasioned by the act of a fellow-servant of the plaintiff for which the defendant was not responsible.

Said motion for a nonsuit was denied by the Court, to which said ruling defendant duly excepted. [74]

DEFENDANT'S EXCEPTION NUMBER 9.

[Testimony of James Spain, for Defendant.]

JAMES SPAIN was thereupon sworn for defendant, and on direct examination testified:

I am at present the woods foreman of the Metropolitan Redwood Lumber Company, in this county. I have held that position three years, a little over. I have followed the logging and lumbering business for thirty-nine years. I have had thirty-nine years' experience. I was the foreman of the Metropolitan Redwood Lumber Company on August 15th, 1910, at the time of this injury. I was not present at the time of this injury. I was up at the other landing there, the other donkey, in another portion of the woods. I know the particular place where the accident occurred. I am familiar with it. Mr. Davis was a member of Red Gordon's crew. Tom Breunius was the engineer, Mike Carey was a rigging-man and Paul Laird, a rigging-man, were members of that crew at that time, and a fellow we called Texas Jack was sniper. Mike Kindergan was upon

(Testimony of James Spain.)

the landing, loading. Billy Jenetti was the whistle-boy. I remember the occasion of them going over to this particular place to work. I instructed them to go over there. I instructed Red Gordon. I told him to go ahead and make a road and pull logs. That means go over there and make his donkey site and get his road ready; there was grading to do upon the road there, get his strap ready and hang out his blocks and this "Tommy Moore" and stretch his line. They had been working previous to these instructions to go over on the other side with what we called the "half-breed" donkey. That donkey was located just across the track in reference to this location. They used the new donkey in the new place. Fourteen hundred feet of line, inch and a quarter main line, came with the new donkey, and there was also a back line. That back line is a small cable that pulls the big line back into the woods with afterwards. This fourteen hundred feet of line was available for [75] their use in fixing up that place. There was other line there available for their use, two thousand feet of inch and a quarter line across the track on the other donkey, probably seventy-five or eighty feet distant from the place where they were working. I remember of them getting ready and putting the new line upon the donkey. There was too much of it—more than the drum hold. They cut off a piece, two hundred or two hundred and fifty feet. That laid alongside the donkey. That line was available for any purpose they wished to use it for there. It was available for "Tommy

(Testimony of James Spain.)

Moore" straps if they desired to use it. The two thousand feet on the other drum, on the other donkey across the road was available. The hook-tender, Gordon, has charge of the selection of the rope that was used for any purpose by the crew. Most anyone of the crew can make the "Tommy Moore" straps. All the rigging crew actually do make them, that is, including Gordon and those under him. I remember prior to this accident of having a conversation with Mr. Davis in regard to where to stand at this particular "Tommy Moore." It was a few days before the accident. I know it was a few days, because the accident happened a few days afterward. That conversation was as follows: Well, I was going down the track and he was leaning up on the stump that the "Tommy Moore" was on. I told him he had better get away from there, that was too close to the "Tommy." He remarked that he could not see any place else. I walked up to him and walked down a little further past the stump where I saw there was a good place, and I told him, here was a good place to stand, he could see just as good as right there at the stump. When I came along down the track Mr. Davis was leaning on this stump, and I took him along here down towards the donkey, about thirty-five or forty feet down the grade. I took him down as far as he could get a view by that stump. Since that time I have gone upon the ground and got into the position where I was then [76] where I could see this road right up close by this stump. I have measured it. It is thirty-eight feet. If he had

(Testimony of James Spain.)

been standing where I showed him, he could not have been caught by this "Tommy Moore" strap because the strap was not long enough. By the breaking of the strap and its going around the stump it would not reach that far. I don't remember any conversation with Mr. Davis at one time when the log became foul with the "Tommy Moore" and I told him that his place was there on this side. I might have, but I don't remember it. It is a fact that his duties were on this side. His duty was when the log came there to unhook the choker and pass it through the "Tommy Moore" and then hook the cable on so it would come in. Before the log approached sufficiently to allow the tag line to pass through the "Tommy Moore" he was to signal the engineer to stop; then to unhook the choker or the tag line and pass it through the "Tommy"; then it was pulled on in, as the log went in. He followed it in to the donkey, unhitched the choker and sent it back to the woods. When I put him in this position by this stump, I came down here far enough so I could see by this stump. This is the stump (showing). It was the nearest stump from there. There was a deep hole by the landing. I took him down here so he could get a view here and see the log projecting in here (shows). I have never given the hook-tender or crew any instructions regarding what rope shall be used in their work. The hook-tender has the discretion in the selection of any rope used by them. In this particular instance, Red Gordon was the hook-tender. Red Gordon had the selection of any

(Testimony of James Spain.)

rope or cable that was used on these operations. From the place that I stationed Mr. Davis by looking through here, he could not only see the log approaching the "Tommy Moore," but he could see over here and see it coming down the hill. He could see up on the side of the hill there. That was talked over with him at the time. Yes, sir, he could see just as well up the [77] sidehill there as he could at the stump. I have investigated to see whether or not you could see the "Tommy Moore" in the position in which it was from any place along from the landing to there (shows) and you can see it any place. (Photograph shown witness.) This is a photograph of that place viewed from where the "Tommy Moore" was standing. The view was taken in this position over here (shows), a side view of this operation. The point on that photograph of the "Tommy Moore" stump is marked "A." The stump from which I took a view when I stationed Mr. Davis is marked "B." The road or driveway came right down this way (shows) from the "Tommy Moore" stump to the landing. That line (showing) represents the dragway, from the "Tommy Moore" stump to the landing. That is down from the "Tommy Moore" stump to the landing. The dragway is immediately behind that line, that depression. This stump (showing stump on plat south of the dragway beyond the "Tommy Moore" stump) is marked "C." When they were making this line out, this road was graded up somewhat along here. The dirt was thrown towards the railroad track immediately

(Testimony of James Spain.)

opposite and to the west of the dragway. The dirt was thrown out there. There was a reddish streak along made by the dirt thrown out.

(There was then received in evidence the photograph above referred to.) On this photograph the "Tommy Moore" stump is marked "A," this stump "B" and this is "C." The landing is not shown in the picture. It was down here (shows), and marked "I." It was in that direction. (Photograph shown to the jury.) I stationed Mr. Davis right here (shows) with reference to the photograph, as far down here as you see by that stump, at the place marked "X." The strap that went around that stump was twenty-five or thirty feet long. These straps would have different lengths depending upon the location of the stump to the roadway. That is the reason the workmen had to make them themselves. They have to make a new "Tommy Moore" strap for each new direction in which they draw the logs, that is, unless it was a [78] straight pull, or unless a former strap would answer the purpose. It is made with two eye splices in it, one on each end, one eye splice on each end, and as the crew are directed to go, or as they go to different logging operations, they themselves have to make a strap for each new situation.

On cross-examination the witness testified:

I have worked three years here for the company, the present owners of the Metropolitan Redwood Lumber Company. I worked for them six or seven years before I came here. This "Tommy Moore,"

(Testimony of James Spain.)

I should think, weighs six or seven hundred pounds. That "Tommy Moore" was held three feet and a half or four feet in suspension from the stump known as the "Tommy Moore" stump. This yellow line upon the map represents the dragway where it comes down here around this turn. This is the stump here, the strap from the "Tommy Moore" went around the stump. The "Tommy Moore" was suspended nearer to the side of the dragway. It was what I call at the side of the dragway, about four feet or four and one-half feet from the stump. I never measured the "Tommy Moore" strap. I did see that strap there before the accident, though I did not examine it. Practically all the stumps are about six or seven or eight feet, some of them not so high from the ground, on this map cut. That "Tommy Moore" stump on the upper side next to the "Tommy" was probably four feet high. It was a little higher than the "Tommy Moore" stump. I never took any notice of the upper side of that stump. I have been at the lower side of it, but I never took any notice of the upper side of it. It would not be over a couple of feet higher. The top of this stump from these figures is twelve feet higher than the center dragway. That is about right. This driveway from where the donkey stood up to the "Tommy Moore" stump was not quite upon a level. It was downhill from the stump to where the donkey stood. In other words, this portion commencing right at the stump here the grade gradually [79] went down and it was lower, considerably lower, than

(Testimony of James Spain.)

when you get down to the landing. The crew up in the woods when they got the log out, they had their whistle-tender there and that whistle-tender gave signals, all necessary signals as the log progressed within his vision. While the log was in his vision he gave signals with his whistle. It was Davis' duty to give signals in reference to the log after the log had passed out of the whistle-tender up here. After it went in sight of the "Tommy Moore" it was Davis'. From that time on until the log got down to the "Tommy Moore" it was Davis' duty to signal if necessary. The whistle-boy signals until it gets out of his vision. When the log came down this roadway until it went over the brow of the hill the whistle-boy did the signaling. After he went over the brow of the hill and within the vision of Davis, it was Davis' duty to give the signal. Somewhere along there, somewhere over one hundred feet it came in sight of Davis and from that time on it was in his charge. Then, when the log got down to the "Tommy Moore," then it was Davis' duty also to make the necessary changes there for the swinging, so that the log could go on its way to the landing. I saw that "Tommy Moore" strap several times before it broke. I remember of being up at this location a few weeks ago with a party of gentlemen, in which I pointed out where you told Davis to go at this particular time. Mr. Kindergan was present at that time. I don't remember of stating at that time that you had previous to the accident told Mr. Davis to stand ten or twelve feet away from that stump or

(Testimony of James Spain.)

fourteen feet, or thirteen feet. I did not state that that day. I pointed out where, to those men, at that time. I walked right up with them at the time I spoke to Mr. Davis. I did not examine the cable any. I knew that cable was made out of a main line. I knew it was made out of rusty cable. Any cable will be rusty if it has laid there a night or two. I don't mean to say it was a new cable at all. I did not know that that strap was [80] made out of that old, discarded cable. I did not know what cable that strap was made out of. I did not know it was not made out of new cable. I knew there was good cable there. The skid road don't run down here to the railroad track. It is run upon a level or slight incline from the "Tommy Moore" stump down to the landing. These grasses are on the side of the driveway next to the railroad track. In other words, it is just back of the grasses; the picture introduced in evidence is taken in front and shows a lot of grass, etc., in front of the roadway. There is no little hill right a short distance from the "Tommy Moore" stump to the landing as pointed out upon the photograph. The hill is here from the center of the road opposite the "Tommy Moore" stump, from there to the landing, the road was upon a regular grade. That line was not put in there to indicate the roadway, but to indicate in a general way where the roadway was. The roadway up to here, as far as this photograph is concerned, runs on the right-hand side of the stump marked "C." This stump marked "B" upon the photograph is represented here upon the

(Testimony of James Spain.)

map (showing). Now, the roadway ran up on the other side of that stump. In other words, it ran upon the other side of the stump marked "C" in the photograph. This is the stump "B" in the photograph (shows). Now, the roadway, of course, runs up on the left-hand side of that stump, looking from the donkey engine to the "Tommy Moore." Here is "B"; now, the roadway runs between "B" and the "Tommy Moore" stump and runs around here. In other words, it runs up that way. The new cable, this inch and a quarter cable, when it was delivered there at the landing, was to be used for the making of "Tommy Moore" straps or any other purpose that was required. The big cable was purchased and shipped up there for the purpose of being used as a drag cable, not for "Tommy Moore" straps or anything of that kind. We got a new donkey and the donkey was put together there. Just before they commenced to go to work on that side of the gulch. It was a big, powerful donkey, and this new cable was to be used as a drag cable on [81] that donkey. There were other cables there which could be used for straps and things of that kind. The logs that were hauled by this cable were large redwood logs running from two feet in diameter and ran up as high as six or seven feet, it might be eight feet, some of them. When this "Tommy Moore" was placed there in position, and held in position by this "Tommy Moore" strap, it was placed there for the purpose of remaining there as long as they hauled down that way to the landing. It was a permanent

(Testimony of James Spain.)

contrivance to remain there as long as they used the road hauling logs down there to that landing, and the "Tommy Moore" did remain there during the time they used that landing and were hauling logs down by it. I don't remember an incident that sometime prior to the accident, of a log being entangled in the "Tommy Moore," and Mr. Davis was not present to give the signal to the engineer, and he was further up the dragway and that I reprimanded him and told him in substance that his place was down there near the stump where he could see the engineer so as to give him the proper signals. I don't remember. I may have done it.

On redirect examination, the witness testified:

In fact, his duties were on this side of the "Tommy Moore," where he could see the engineer and log approaching. It is not a steep grade. It is about the same grade as the railroad runs down here, the same incline from the "Tommy Moore" to the landing. There were two thousand feet of inch and a quarter line immediately across the track available for "Tommy Moore" straps if they saw fit to use that. They had authority to go there and use any portion of that line for that purpose. No instruction was ever given by me to any of the men there not to use that for that purpose. The inch and a quarter line upon the other donkey, the "half-breed," was a good line. It was three or four months old. It was put on there about the first of May.

(Testimony of James Spain.)

On recross-examination the witness testified:
[82]

The two thousand foot cable that was across the gulch was used about three or four months. The new cable of which I have been speaking that was put in use and was in use at the time of the accident lasted, I guess, about a year, anyway. We used it all that season and it was upon the drum in the spring. That cable and one across the gulch were both of the same size, an inch and a quarter. I don't know whether the strap that is in question here, whether that strap was actually made before or after the two hundred and fifty feet was cut off that new cable. The new cable was cut off before the donkey went to work, when the donkey was running enough to put it on. The cable was upon a big spool. Then the donkey was set upon the landing, put up. It was brought there apart and it was put up and afterwards it was run.

On redirect examination the witness testified:

The line was cut, the two hundred and fifty feet were cut off that main line before any log was hauled, or any lines were used that they lay out.

Thereupon defendant rested.

Thereupon defendant made a motion for a nonsuit.

Mr. NEWETT.—Now, all the evidence has been introduced and I make a motion for a nonsuit in this case upon the grounds that the evidence is not sufficient to justify a recovery under the pleadings, and I assign in particular that there is a variance between the allegations and the proof; that no re-

covery can be had for any alleged cause set forth in the amendment of the year 1907 to section 1970 of the Civil Code of this State. That, under the circumstances of the case, the evidence shows that the plaintiff was injured by the ordinary risks of the business which he had assumed.

2d. That he was guilty of contributory negligence.

3d. That any injury caused to him was caused by the negligence of a fellow-servant or fellow-servants, employed by the said [83] defendant in the same general business.

I don't know whether your Honor desires any further argument.

The Court thereupon denied said motion, and defendant duly excepted to said ruling of the Court.

DEFENDANT'S EXCEPTION NO. 10.

Thereupon counsel proceeded to argue the case before the jury.

The Court thereupon instructed the jury as follows, to the giving of each and every one of such instructions, where herein noted, defendant excepted:

Instructions.

The COURT.—Gentlemen of the Jury:

1. The plaintiff seeks in this action to recover damages from defendant by reason of certain injuries alleged to have been suffered by him, and which it is charged were occasioned by the negligence of the defendant. The particular charge is that the defendant carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore" strap, and on the 15th day of

August, 1910, the said "Tommy Moore" strap was in an unsafe and defective condition; that it was unsafe, defective and dangerous in this, that said strap was made out of an old, badly worn, weak and rusty cable and did not possess sufficient tensile strength to withstand the strain that was placed upon it.

DEFENDANT'S EXCEPTION NO. 11.

2. Now, the burden of proof is upon the plaintiff to sustain these allegations. He must sustain them by a preponderance of the evidence, and before you would be warranted in returning a verdict for the plaintiff you must be satisfied that the injury sustained by plaintiff was by reason of having in use a defective strap, one that was not reasonably safe for use.

DEFENDANT'S EXCEPTION NO. 12.

3. You are instructed, gentlemen, that you are the exclusive [84] judges of the creditability of the witnesses, and of the weight to be attached to the testimony of each and all of them.

DEFENDANT'S EXCEPTION NO. 13.

4. You are not bound to believe anything to be a fact because a witness has stated it to be so, or to take the testimony of any witness as absolutely true, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken as to the matters testified to by him, or that for any reason his testimony is untrue or unreliable. The substance of that instruction is simply, gentlemen, that you should believe those witnesses whom you do believe, and act upon their testimony;

the testimony that you do not believe you will reject from your consideration.

DEFENDANT'S EXCEPTION NO. 14.

5. I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employee is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they had been so furnished and provided, and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care.

DEFENDANT'S EXCEPTION NO. 15. [85]

6. An employee is not bound to know or inquire whether the machinery, or appliances or structure furnished him by the master are unsafe or unsound, because there is an implied undertaking upon the part of the employer that all that can be reasonably done by the exercise of ordinary care has been done

to render the machinery, appliances or structures reasonably safe. The employee has a right to rely upon his employer's care and judgment in the matter of providing reasonably safe machinery, appliances or structures, and may rightfully assume that the employer has exercised ordinary care in these respects, and that such machinery, appliances or structures furnished by the employer to be used by him in the business are reasonably safe and secure, unless he knows to the contrary. Of course, if by working with them his attention is called to the fact that it is unsafe and dangerous, then, as a matter of course, he is required to act upon that knowledge.

DEFENDANT'S EXCEPTION NO. 16.

7. I instruct you that if you find from a preponderance of the evidence that at the time the plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable "Tommy Moore" strap, and that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said "Tommy Moore" strap, if such condition you find existed, then unless plaintiff through negligence contributed to such injury, your verdict must be for the plaintiff.

DEFENDANT'S EXCEPTION NO. 17.

8. You are instructed that the burden of proof rests upon defendant to establish by a preponder-

ance of the evidence the facts [86] necessary to constitute the defense of assumption of risk, which the defendant alleged as a defense in the action.

DEFENDANT'S EXCEPTION NO. 18.

9. I instruct you that the burden of proof rests upon the defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of contributory negligence which is alleged by the defendant as a defense.

DEFENDANT'S EXCEPTION NO. 19.

10. Of course, a person employed to do work assumes the ordinary risks of such employment, and you are charged that the ordinary risks of the business in which one is employed are such as the employee is as likely to know as the master. They are such risks as can be reasonably foreseen and which are the natural and ordinary incidents of the work that the employee agrees to do, and which are liable to happen in the performance of such, although the employer discharges his duty and exercises due care.

DEFENDANT'S EXCEPTION NO. 20.

11. The rule that the servant takes the ordinary risks of the business presupposes that the master will perform the duty of caution and care which the law casts upon him. It is those risks alone which cannot be obviated by the use of ordinary care by the master, that the servant assumes.

DEFENDANT'S EXCEPTION NO. 21.

12. A person who enters the service of another assumes all the ordinary risk incident to the employment in which he is engaged. While this is the

law upon this subject, it is qualified by the rule that the employer is charged in the law with the duty of not subjecting his employee to risks by his own negligence.

DEFENDANT'S EXCEPTION NO. 22.

13. Under this rule the employer is required to use ordinary [87] care, not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence directly or proximately causes injury to the employee, he is responsible to the person injured thereby, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which the employee was engaged, were unsafe or unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continued in the use thereof.

DEFENDANT'S EXCEPTION NO. 23.

14. You are further instructed that knowledge by an employee injured of the defective or unsafe condition or character of any machinery, ways, appliances or structures of such employer, shall not be a bar to a recovery for any injury caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter con-

sented to use the same or continued in the use thereof.

DEFENDANT'S EXCEPTION NO. 24.

15. You are charged that should you find from the evidence that the injuries complained of by the plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 25.

16. In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into [88] consideration all of the facts and circumstances of the case, and if from the consideration of all the other facts and circumstances, you find that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injury complained of, then I charge you that plaintiff was guilty of contributory negligence and cannot recover in this action, and you must return a verdict in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 26.

17. In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover all damages shown by the evidence which he has suffered up to the time of the trial, which were proximately caused by said injury whether they could have been anticipated or not, and all damages which it is reasonably probable that he will sustain in the future by reason of the said injury not exceeding the amount demanded in the complaint.

In estimating the compensatory damages in cases of this character, all the proximate consequences of the injury shown by the evidence, future as well as past, are to be taken into consideration, including the bodily pain which resulted from the injury, the impairment of physical powers, the impairment of the plaintiff's power to labor and earn his living, and he should be awarded, if entitled to a verdict at all, sufficient to compensate him for all the proximate detriment shown by the evidence, past and prospective.

These are intended to include and embrace indemnity for loss of power or loss of capability to perform ordinary labor, or the capacity to earn money, and reasonable satisfaction for loss of physical power as shown by the evidence, always keeping in mind the fact that the plaintiff is not entitled to recover what is known as exemplary damages; simply damages which in your judgment would reasonably [89] compensate him for the injuries he has sustained, if this defendant is liable therefor. The elements of damage are in their very nature not susceptible of a precise or exact compensation, and the determination of the amount is committed to the sound judgment and good sense of the jury, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for the detriment proximately caused by such injury, and shown by the evidence, not exceeding the amount claimed in the complaint.

DEFENDANT'S EXCEPTION NO. 27.

I instruct you that negligence is a relative term,

and is defined to be, the omission to do something that a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but always relates to some circumstance of time, place or persons. Its application depends upon the situation of the parties, and the degree of care and vigilance that the circumstances reasonably impose. The degree is not the same in all cases, but varies according to the danger involved in the want of care and caution.

You are instructed that the term "contributory negligence" is defined in law as follows: Contributory negligence in its legal signification is such an act or omission upon the part of a person injured as amounts to a want of ordinary care, and which concurring or co-operating with the negligent act of another person is the proximate cause or causes of the injury complained of.

I charge you that should you believe from the evidence that at the time he was injured plaintiff had placed himself in a position near the appliance known as the "Tommy Moore," and should you further find that he placed himself in such position voluntarily and not in the discharge of his duties, and should you find that an ordinarily [90] prudent and careful man would not, under the same circumstances, have placed himself in such position, and that such position was a dangerous one, and plaintiff fully understood, comprehended and appreciated the danger of occupying such position, and that by reason of being in such position, plaintiff was struck

and injured, then I instruct you that plaintiff is not entitled to recover and your verdict should be in favor of the defendant.

You are charged that should you find from the evidence that the plaintiff when injured was in an improper place, and one not required, or intended or designed to be so used in performance of the duties for which he was hired, and in a position in which it *was customary* nor necessary nor proper for a man to occupy, and that the plaintiff had taken such position voluntarily and without authority, knowledge or acquiescence of the defendant, and that prior to the injury he had been warned and cautioned of the danger of such position by James Spain, the woods foreman, and that he was injured wholly in consequence of having taken such a position, then I instruct you that under such circumstances he cannot recover in this action, and your verdict should be for the defendant.

You are charged that an employer is not required to supply the best, newest or safest appliances to secure the safety of his employees, nor is he bound to insure the safety of the place or the appliances he furnishes. His duty in this respect is discharged when he has exercised ordinary care to furnish a place and appliances reasonably safe and suitable for the use of his employee. Thus in this case it is the duty of the defendant to furnish a "Tommy Moore" strap which in the judgment of a reasonable and prudent man would be reasonably safe and suitable for the work that it would be called upon to do. If, therefore, you find from the evidence that the defendant exercised ordinary care in furnishing a rea-

sonably safe and suitable "Tommy Moore" strap, then I instruct you that said defendant has performed [91] its full duty in that respect, even if you further find that said strap was not the best, newest or safest strap.

I am requested to give you this instruction, which I do. You are the exclusive judges of the creditability of each and every witness who has testified in your hearing; it is for you to say from your observation of the testimony given by the witness, of his manner of testifying, of his demeanor when upon the witness stand, of his interest, if any, in the present action, whether or not he speaks the truth. In passing upon the weight to be given the testimony of any witness who has testified in your hearing, it is your duty to consider—

1st. What knowledge has the witness relative to the facts concerning which he testifies?

2d. Does he narrate truthfully those facts?

3d. Is his interest in the case such as would lead him to state that which is not true, or would lead him to color his testimony?

4th. Is the memory of the witness sufficiently accurate to warrant you in believing that he can accurately remember the facts to which he testifies?

5th. Has the witness at other times made a statement at variance with his present testimony; and,

Lastly. In weighing the testimony of a witness it is your duty to weigh it in accordance with your ordinary experience of the acts and conduct of mankind generally; in other words, in determining the truth from the evidence, your ordinary experience

in the daily affairs of life must guide you in so determining.

It is admitted in the pleadings that at all times mentioned in the complaint the Metropolitan Redwood Company defendant was, and is now, a corporation duly organized under the laws of the State of Michigan and having its principal place of business in the City of Eureka. A corporation is defined to you to be a creature of the law [92] having certain powers and duties of a natural person, and continuing its existence for such length of time as the law prescribes. In this connection you are instructed that while a corporation is a creature of the law, it is none the less simply a collection of individuals doing business in their collective capacity by means of the legal entity called a corporation.

A corporation is regarded in law as having the same rights as a natural person, and when sued is entitled to the same protection as would be accorded to a natural person. In the present case, therefore, you must accord to the Metropolitan Redwood Lumber Company the same protection in its property rights that you would give to an individual similarly situated. The fact that it is a corporation must not in any manner weigh with or influence you in your deliberations in the present case.

DEFENDANT'S EXCEPTION NO. 27.

18. In addition to these instructions, I will give you the following: An employer is not bound to indemnify his employee for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the

negligence of another person employed by the same employer in the same general business, provided, nevertheless, an employer shall be liable for such injury when the same results from the wrongful act or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured.

DEFENDANT'S EXCEPTION NO. 28.

19. The evidence in this case shows without any conflict, that if there was any negligence in the construction or use of this "Tommy Moore" strap, that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible.

DEFENDANT'S EXCEPTION NO. 29. [93]

Counsel for defendant thereupon duly requested the Court to give each and every of the following instructions to the jury, but the Court refused to give and did not give to the jury any of said instructions, and to which said refusal to give said instructions and each thereof, defendant duly excepted:

1. In the present case plaintiff seeks to recover damages against defendant by reason of certain injuries alleged to have been suffered by plaintiff, and which it is alleged were occasioned by the negligence of defendant.

DEFENDANT'S EXCEPTION NO. 30.

2. I charge you that in a civil action such as the present one, the burden of proof is on the plaintiff, and further, that in this action, in order to recover, the plaintiff is compelled to prove each and every

material allegation in his complaint by a preponderance of evidence, and if you find that plaintiff has failed so to do, you, the jury must find in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 31.

3. I charge you that in passing upon the evidence adduced by the plaintiff, nothing is to be assumed or taken for granted in plaintiff's favor; that is to say, the law requires that plaintiff must prove his case to the satisfaction of the jury, by a preponderance of the testimony. If then you should find that the plaintiff has failed to prove any material allegation of his complaint by a preponderance of the testimony to your satisfaction, or if you should find that the testimony is equally balanced upon any particular fact essential to plaintiff's case, or if you should find that the weight of the testimony is **against** the truth of such allegation or fact, then plaintiff has failed to prove such allegation or fact, in the manner the law requires.

DEFENDANT'S EXCEPTION NO. 32. [94]

4. I instruct you that by the term "risks of the business" are meant such risks as the employee is as likely to know as the master, and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work, or which are liable to happen from the negligence or carelessness of a fellow-employee engaged in the same general business. In connection with the foregoing I instruct you that a servant entering into employment assumes the ordinary risks incident to such employment, and

among such risks and as a part of the same the employee assumes the danger of injury arising from working in a dangerous place, where the danger incident to working in such place is fully known, comprehended and appreciated by the servant, and further such servant also assumes the danger of receiving injury from the negligence of a fellow-servant or workman engaged in the same occupation or business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or unless the employer has neglected to use ordinary care in the selection of the culpable employee.

If, therefore, you find from the evidence that the plaintiff received the injuries complained of while in the employ of defendant and that such injuries were occasioned by the happening of an event which was one of the risks of the business in which said plaintiff was engaged, then I charge you that plaintiff is not entitled to recover in this action, and your verdict must be in favor of defendant.

DEFENDANT'S EXCEPTION NO. 33.

5. I charge you that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of defendant. In passing upon the question as to [95] whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of

all the facts and circumstances of the case you find from the evidence that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injuries complained of, then I charge you that plaintiff was guilty of negligence, and cannot recover in this action, and you must return a verdict in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 34.

6. I charge you that if the injury to plaintiff complained of was not the natural or probable or proximate consequence of the negligent act of the defendant, there can be no recovery in this action.

If, therefore, you find from a preponderance of the evidence that the defendant was negligent in failing to exercise reasonable care to furnish the plaintiff with a reasonably safe "Tommy Moore strap," yet if you also find from a preponderance of the evidence that such failure to furnish said "strap" on the part of the defendant was not the natural or probable or proximate cause of the injury complained of, but that the proximate cause of the injury to plaintiff was the fact that said plaintiff voluntarily assumed a position near said strap which he knew to be dangerous, and that he fully understood, comprehended and appreciated the danger of such position, then under such circumstances your verdict must be for the defendant.

DEFENDANT'S EXCEPTION NO. 35.

7. I charge you that where a person undertakes to work in a place where conditions of danger are

liable to occur in the ordinary prosecution of the work, and he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, [96] he is deemed to assume the perils incident to the employment and can recover from the employer compensation for injuries resulting therefrom.

If, therefore, you find from the evidence that the plaintiff undertook to work for defendant at a place near the "Tommy Moore strap," and that such place was a dangerous place in the ordinary prosecution of the work, and that plaintiff at and before the time of the injury had knowledge of such dangers, or that his facilities for seeing or discovering them were just as good as those of the defendant, and that he undertook and continued until the time of the injury in the work with the knowledge or opportunity for ascertaining those dangers, then I instruct that under such circumstances, plaintiff assumed the risks of such employment and cannot recover from the defendant for injuries resulting therefrom.

DEFENDANT'S EXCEPTION NO. 36.

8. I charge you that an employee, by entering or continuing in the employment of his employer without complaint, assumes the risks and dangers of the service which he knows and fully understands, comprehends and appreciates.

If, therefore, you find from the evidence that the

plaintiff had for a period of time prior to this injury, had charge of the "Tommy Moore" and had worked on or about said "Tommy Moore strap" and had prior thereto worked in similar positions with other crews employed by the same defendant; and if you further find that from such experience the said plaintiff at the time of the injury fully understood, comprehended and appreciated the risk and danger of the service he was performing and the risk and danger of the breaking of said "Tommy Moore strap," and that said plaintiff continued in said employment up to the time of the injury without making any complaint whatever, then I instruct you that under such circumstances the said plaintiff assumed the risk and danger arising from the breaking of said "Tommy Moore [97] strap" and cannot recover in this action.

DEFENDANT'S EXCEPTION NO. 37.

9. I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has its reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, then, under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the em-

ployees and not that of the employers.

If, therefore, in this case you find from the evidence that the defendant did exercise ordinary care in furnishing reasonably safe and suitable material for the construction of "Tommy Moore straps" to be used by its employees in constructing such straps for use in work, the character or place which necessarily changed as the work progressed, and that certain of such employees of defendant being fellow-servants of plaintiff employed by the same defendant in the same general business, did in the course of their duty construct the "Tommy Moore strap," which broke and injured plaintiff, out of the material so furnished by defendant, and if you further find that in so constructing said strap said fellow-employees of defendant negligently selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow-servants in so negligently selecting defective material in the construction of said strap, then I charge you that under such circumstances *and* such negligence would be the negligence of fellow-servants of plaintiff, and your verdict should be for defendant. [98]

DEFENDANT'S EXCEPTION NO. 38.

10. I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work including the maintenance of the place in such reasonably safe condition, nevertheless such duty of maintenance is not so absolute as to charge the employer with liability for injuries to

employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of work are assumed by the employees there employed.

DEFENDANT'S EXCEPTION NO. 39.

11. I charge you that a lumber company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its employees no duty to adopt a different method, and it is not guilty of negligence for a failure so to do.

DEFENDANT'S EXCEPTION NO. 40.

12. I charge you that as between employer and employee the duty of so using a reasonably safe place, or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master.

If, therefore, you find from the evidence that the injury to plaintiff complained of was due wholly to the negligence of the fellow-servants of said plaintiff employed by the same defendant in the same general business, in negligently failing to conform

to an established [99] and reasonably safe method of work or in negligently operating reasonably safe machinery or in negligently using a reasonably safe place, then under such circumstances your verdict must be for the defendant.

DEFENDANT'S EXCEPTION NO. 41.

13. I instruct you as a matter of law that under the pleadings and evidence in this case, James Spain, the woods foreman, and the plaintiff were fellow-servants employed by the same employer in the same general business, and that the defendant therefore is not responsible for any negligence on the part of said James Spain, even if the evidence discloses any such negligence.

If, therefore, the injury to plaintiff complained of was due wholly to the negligence of said James Spain, your verdict must be in favor of defendant.

DEFENDANT'S EXCEPTION NO. 42.

14. I instruct you as a matter of law that under the pleadings and the evidence in this case Gordon, Laird and Carey were fellow-servants of plaintiff employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such.

DEFENDANT'S EXCEPTION NO. 43.

15. I instruct you that under all the evidence in this case your verdict must be in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 44.

The cause was thereupon submitted to the jury,

which retired and subsequently returned with a verdict in the above-entitled cause in the following form:

“We, the jury, find in favor of the plaintiff herein and against the defendant herein, and assess the damages in the sum of Ten Thousand Dollars.”

Said verdict was by the Court thereupon ordered filed and entered [100] and defendant thereupon duly excepted to said verdict and the entry thereof, upon the ground that said verdict was against law.

DEFENDANT'S EXCEPTION NO. 45.

Thereupon judgment was entered herein in accordance with the said verdict in favor of plaintiff and against the defendant for the sum of Ten Thousand Dollars and costs of suit, and thereupon defendant duly excepted to said judgment and the entry thereof.

DEFENDANT'S EXCEPTION NO. 46.

Specifications of Errors of Law Occurring at the Trial of the Above-entitled Action and Excepted to by the Defendant.

The defendant hereby specifies the following errors of law which occurred at the trial of said action, and were excepted to by the defendant. The Court erred at said trial in each and every of the following particulars:

1. In overruling defendant's objection to the following questions asked Hugh Davis:

Q. Were you told to go by Mr. Spain and where to work?

A. Yes, sir, I was told by Mr. Spain that I be-

longed here at this place.

Q. Do you remember the incident of his telling you that? A. Yes, sir.

Q. Go on and state just what he told you.

Excepted to as defendant's exception No. 1.

2. In denying the motion to strike out the answer of witness Davis to the question:

Q. He told you that was the place for you to stand where you could see the log and give the signal?

A. Yes, sir, see the log and give the signal to the engineer at the same time.

Excepted to as defendant's exception No. 2.
[101]

3. In overruling defendant's objection to the following question asked witness Paul Laird:

WITNESS.—The hook-tender instructed us to make that strap.

Q. What was his name?

Excepted to as defendant's exception No. 3.

4. In denying defendant's motion to strike out the following answer to the above question:

A. His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of.

Excepted to as defendant's exception No. 4.

5. In overruling defendant's objection to the following question asked witness Laird:

Q. Will you go on and state the condition of that cable, the condition the cable was in when you made the strap out of it, the condition of the piece of cable that you made the strap of?

A. Well, it was a very poor piece of line in my estimation.

Excepted to as defendant's exception No. 5.

6. In overruling defendant's objection to the following question asked witness Laird:

Q. After you had made this strap and before the accident, did you have any conversation with the hook-tender, Mr. Gordon, in reference to the strap?

Excepted to as defendant's exception No. 6.

7. In overruling defendant's objection to the following question asked witness Laird:

Q. Did he give you the reason, did he state to you why he was not permitted to use the new line?

A. Well, this line we used was not fit to be used, he said. [102]

Excepted to as defendant's exception No. 7.

8. In denying the motion to strike out the answer of witness Laird to the question:

Q. Go on and state what he said about that.

A. Well, in our conversation, whatever it was, I don't distinctly remember at present, he said he wanted to get a new piece out of the new line, but they would not stand for it, they said use the old line, it was good enough. He didn't say who it was.

Excepted to as defendant's exception No. 8.

9. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception No. 9.

10. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception No. 10.

11. In giving to the jury over the objection of defendant, the following instructions:

"The plaintiff seeks in this action to recover

damages from defendant by reason of certain injuries alleged to have been suffered by him, and which it is charged were occasioned by the negligence of the defendant. The particular charge is that the defendant carelessly and negligently failed and neglected to provide and maintain a safe and suitable 'Tommy Moore strap,' and on the 15th day of August, 1910, the said 'Tommy Moore strap' was in an unsafe and defective condition; that it was unsafe, defective and dangerous in this, that said strap was made out of an old, badly worn, weak and rusty cable, and did not possess sufficient tensile strength to withstand the strain that was placed upon it."

Excepted to as defendant's exception No. 11.

12. In giving to the jury over the objection of defendant, the following instructions:

"Now, the burden of proof is upon the plaintiff to sustain these allegations. He must sustain them by a preponderance of the [103] evidence, and before you would be warranted in returning a verdict for the plaintiff you must be satisfied that the injury sustained by plaintiff was by reason of having in use a defective strap, one that was not reasonably safe for use."

Excepted to as defendant's exception No. 12.

13. In giving to the jury, over the objection of defendant, following instruction:

13. "You are instructed, gentlemen, that you are the exclusive judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them."

Excepted to as defendant's exception No. 13.

14. In giving to the jury, over the objection of defendant, the following instructions:

“You are not bound to believe anything to be a fact because a witness has stated it to be so, or to take the testimony of any witness as absolutely true, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken as to the matters testified to by him, or that for any reason his testimony is untrue or unreliable. The substance of that instruction is simply, gentlemen, that you should believe those witnesses whom you do believe, and act upon their testimony; what you do not believe you will reject from your consideration.”

Excepted to as defendant's exception No. 14.

15. In giving to the jury, over the objection of defendant, the following instruction:

“I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employee is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they have been so furnished and provided, [104] and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which

he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care."

Excepted to as defendant's exception No. 15.

16. In giving to the jury, over the objection of defendant, the following instruction:

"An employee is not bound to know or inquire whether the machinery, appliances or structures furnished him by the master are unsafe or unsound, because there is an implied undertaking upon the part of the employer that all that can be reasonably done by the exercise of ordinary care has been done to render the machinery, appliances or structures reasonably safe. The employee has a right to rely upon his employer's care and judgment in the matter of providing reasonably safe machinery, appliances or structures, and may rightfully assume that the employer has exercised ordinary care in these respects and that such machinery appliances or structures furnished by the employer to be used by him in the business, are reasonably safe and secure, unless he knows to the contrary. Of course, if by working with them his attention is called to the fact that it is unsafe and dangerous, then as a matter of course he is required to act upon that knowledge."

Excepted to as defendant's exception No. 16.

17. In giving to the jury, over the objection of defendant, the following instruction:

“I instruct you that if you find from a preponderance of [105] the evidence that at the time plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable ‘Tommy Moore strap,’ and that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said ‘Tommy Moore strap,’ if such condition you find existed, then unless plaintiff through negligence contributed to such injury, your verdict must be for the plaintiff.”

Excepted to as defendant’s exception number 17.

18. In giving to the jury, over the objection of defendant, the following instruction:

“You are instructed that the burden of proof rests upon defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of assumption of risk, which the defendant alleges as a defense in the action.

Excepted to as defendant’s exception number 18.

19. In giving to the jury, over the objection of defendant, the following instruction:

“I instruct you that the burden of proof rests upon the defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of contributory negligence which is alleged by the defendant as a defense.”

Excepted to as defendant’s exception number 19.

20. In giving to the jury, over the objection of defendant, the following instruction:

“Of course, a person employed to do work assumes the ordinary risks of such employment, and you are charged that the ordinary risk of the business in which one is employed are such as the employee is as likely to know as the master, *they risks* as can be [106] reasonably foreseen and which are the natural and ordinary incidents of the work that the employee agrees to do, and which are liable to happen in the performance of such work, although the employer discharges his duty and exercises due care.”

Excepted to as defendant's exception number 20.

21. In giving to the jury, over the objection of defendant, the following instruction:

“The rule that the servant takes the ordinary risk of the business presupposes that the master will perform the duty of caution and care which the law casts upon him. It is those risks alone which cannot be obviated by the use of ordinary care by the master, that the servant assumes.”

Excepted to as defendant's exception number 21.

22. In giving to the jury, over the objection of the defendant, the following instruction:

“A person who enters the service of another assumes all the ordinary risks incident to the employment in which he is engaged. While this is the law upon this subject, it is qualified by the rule that the employer is charged in law with the duty of not subjecting his employee to risks by his own negligence.”

Excepted to as defendant's exception number 22.

23. In giving to the jury, over the objection of the

defendant, the following instruction :

“Under the rule the employer is required to use ordinary care, not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence directly or proximately causes injury to the employee he is responsible to the person injured, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which [107] the employee was engaged, were unsafe or unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continued in the use thereof.”

Excepted to as defendant's exception number 23.

24. In giving to the jury, over the objection of the defendant, the following instruction :

“You are further instructed that knowledge by an employee injured of the defective or unsafe condition or character of any machinery, ways, appliances or structures of such employer shall not be a bar to a recovery for any injury caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof.”

Excepted to as defendant's exception number 24.

25. In giving to the jury, over the defendant's objection, the following instruction:

"You are charged that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence, or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of the defendant."

Excepted to as defendant's exception number 25.

26. In giving to the jury, over the defendant's objection, the following instruction:

"In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of all the other facts and circumstances you find that the plaintiff did not act as an ordinarily prudent or careful [108] man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injury complained of, then I charge you that plaintiff was guilty of contributory negligence and cannot recover in this action, and you must return a verdict in favor of defendant."

Excepted to as defendant's exception number 26.

27. In giving to the jury, over the defendant's objection, the following instruction:

"In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover all damages shown by the evidence which he has suffered up to the time of the trial, which were proximately caused by said injury whether they could have been

anticipated or not, and all damages which it is reasonably probable that he will sustain in the future by reason of the said injury not exceeding the amount demanded in the complaint.

In estimating the compensatory damages in cases of this character, all of the proximate consequences of the injury shown by the evidence, future as well as past, are to be taken into consideration, including the bodily pain which resulted from the injury, the impairment of physical powers, the impairment of the plaintiff's power to labor and earn his living, and he should be awarded, if entitled to a verdict at all, sufficient to compensate him for all proximate detriment shown by the evidence, past and prospective.

These are intended to include and embrace indemnity for loss of power or loss of capability to perform ordinary labor, or the capacity to earn money, and reasonable satisfaction for loss of physical power if shown by the evidence, always keeping in mind the fact that the plaintiff is not entitled to recover what is known as exemplary damages; simply damages which in your judgment would reasonably compensate him for the injuries he has sustained, if this defendant is liable therefor. The elements of damage are in their very nature not susceptible [109] of any precise or exact compensation, and the determination of the amount is committed to the sound judgment and good sense of the jury, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for the detriment proximately caused by such injury, and shown by the evidence,

not exceeding the amount claimed in the complaint.”

Excepted to as defendant's exception number 27.

28. In giving to the jury, over the defendant's objection, the following instruction:

“In addition to these instructions, I will give you the following: An employer is not bound to indemnify his employee for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, provided, nevertheless, an employer shall be liable for such injury when the same results from the wrongful act or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured.”

Excepted to as defendant's exception number 28.

29. In giving to the jury, over the defendant's objection, the following instruction:

“The evidence in this case shows without any conflict, that if there was any negligence in the construction or use of this “Tommy Moore strap,” that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible.”

Excepted to as defendant's exception number 29.

30. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“In the present case plaintiff seeks to recover damages against [110] defendant by reason of certain injuries alleged to have been suffered by plaintiff,

and which it is alleged were occasioned by the negligence of defendant."

Excepted to as defendant's exception number 30.

31. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that in a civil action such as the present one, the burden of proof is on the plaintiff, and further, that in this action, in order to recover, the plaintiff is compelled to prove each and every material allegation in his complaint by a preponderance of evidence, and if you find that plaintiff has failed so to do, you the jury must find a verdict in favor of the defendant."

Excepted to as defendant's exception number 31.

32. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that in passing upon the evidence adduced by the plaintiff, nothing is to be assumed or taken for granted in plaintiff's favor; that is to say, the law requires that plaintiff must prove his case to the satisfaction of the jury, by a preponderance of the testimony. If, then, you should find that the plaintiff has failed to prove any material allegation of his complaint by a preponderance of the testimony to your satisfaction, or if you should find that the testimony is equally balanced upon any particular fact essential to plaintiff's case, or if you should find that the weight of the testimony is against the truth of such allegation or fact, then plaintiff has failed to prove such allegation or fact, in the manner the law requires."

Excepted to as defendant's exception number 32.

33. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I instruct you that by the term ‘risks of the business’ are meant such risks as the employee is as likely to know as the master, [111] and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work, or which are liable to happen from the negligence or carelessness of a fellow-employee engaged in the same general business. In connection with the foregoing I instruct you that a servant entering into employment assumes the ordinary risks incident to such employment, and among such risks and as part of the same the employee assumes the danger of injury arising from working in a dangerous place, where the danger incident to working in such place is fully known, comprehended and appreciated by the servant, and further, such servant also assumes the danger of receiving injury from the negligence of a fellow-servant or workman in the same occupation or business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or unless the employer has neglected to use ordinary care in the selection of the culpable employee.

If, therefore, you find from the evidence that the plaintiff received the injuries complained of while in the employ of defendant, and that such injuries were occasioned by the happening of an event which was one of the risks of the business in which said plaintiff was engaged, then I charge you that plain-

tiff is not entitled to recover in this action, and your verdict must be in favor of defendant."

Excepted to as defendant's exception number 33.

34. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of defendant. In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of [112] the case, and if from consideration of all of the facts and circumstances of the case you find from the evidence that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injuries complained of, then I charge you that plaintiff was guilty of negligence and cannot recover in this action, and you must return a verdict in favor of the defendant."

Excepted to as defendant's exception number 34.

35. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that if the injury to plaintiff complained of was not the natural or probable or proximate consequence of the negligent act of the defendant, there can be no recovery in this action.

If, therefore, you find from a preponderance of

the evidence that the defendant was negligent in failing to exercise reasonable care to furnish the plaintiff with a reasonably safe 'Tommy Moore strap,' yet if you also find from a preponderance of the evidence that such failure to furnish said 'strap' on the part of the defendant was not the natural or probable or proximate cause of the injury complained of, but that the proximate cause of the injury to plaintiff was the fact that said plaintiff voluntarily assumed a position near said strap which he knew to be dangerous, and that he fully understood, comprehended and appreciated the danger of such position, then, under such circumstances, your verdict must be for the defendant."

Excepted to as defendant's exception number 35.

36. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work, and he has knowledge of such danger, or his facilities for seeing or discovering them are just as good as those of his [113] employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is deemed to assume the perils incident to the employment, and can recover from the employer compensation for injuries resulting therefrom.

If, therefore, you find from the evidence that the plaintiff undertook to work for defendant at a place near the 'Tommy Moore strap,' and that such place

was a dangerous place in the ordinary prosecution of the work, and that plaintiff at and before the time of the injury had knowledge of such dangers, or that his facilities for seeing or discovering them were just as good as those of the defendant, and that he undertook and continued until the time of the injury in the work with the knowledge or opportunity for ascertaining those dangers, then I instruct that, under such circumstances, plaintiff assumed the risk of such employment and cannot recover from the defendant for injuries resulting therefrom."

Excepted to as defendant's exception number 36.

37. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that an employee by entering or continuing in the employment of his employer without complaint assumes the risks and dangers of the service which he knows and fully understands, comprehends and appreciates.

If, therefore, you find from the evidence that the plaintiff had, for a period of time prior to the injury, had charge of the 'Tommy Moore' and had worked on or about said 'Tommy Moore strap,' and had prior thereto worked in similar positions with other crews employed by the same defendant, and if you further find that from such experience the said plaintiff at the time of the injury fully understood, comprehended and appreciated the risk and danger of the service he was performing and the risk and danger of the breaking of said 'Tommy Moore strap,' and that said plaintiff continued in said

[114] employment up to the time of the injury without making any complaint whatever, then I instruct you that under such circumstances the said plaintiff assumed the risk and danger arising from the breaking of said 'Tommy Moore strap' and cannot recover in this action."

Excepted to as defendant's exception number 37.

38. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, then, under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the employees and not that of the employers.

If, therefore, in this case you find from the evidence that defendant did exercise ordinary care in furnishing reasonably safe and suitable material for the construction of 'Tommy Moore straps' to be used by its employees in constructing such straps for use in work the character or place of which necessarily changed as the work progressed, and that certain of such employees of defendant, being fellow-

servants of plaintiff employed by the same defendant in the same general business, did in the course of their duty construct the 'Tommy Moore strap' which broke and injured plaintiff, out of the material so furnished by defendant, and if you further find that in so constructing said strap said fellow-employees of defendant negligently [115] selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow-servants in so negligently selecting defective material in the construction of said strap, then I charge you that under such circumstances such negligence would be the negligence of fellow-servants of plaintiff and your verdict should be for defendant."

Excepted to as defendant's exception number 38.

39. In refusing to give to the jury, at the request of defendant, the requested instructions, as follows:

"I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work, including the maintenance of the place in such reasonably safe condition, nevertheless such duty of maintenance is not so absolute as to charge the employer with liability for injuries to employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of

work are assumed by the employees there employed.”

Excepted to as defendant’s exception number 39.

40. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I charge you that a lumber company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its employees no duty to adopt a different method, and it is not guilty of negligence for a failure so to do.”

Excepted to as defendant’s exception number 40.
[116]

41. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I charge you that as between employer and employee the duty of so using a reasonably safe place, or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master.

If, therefore, you find from the evidence that the injury to plaintiff complained of was due wholly to the negligence of the fellow-servants of said plaintiff employed by the same defendant in the same general business, in negligently failing to conform to an established and reasonably safe method of work, or in negligently using a reasonably safe place, then under such circumstances your verdict must be for the defendant.”

Excepted to as defendant’s exception number 41.

42. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I instruct you as a matter of law that under the pleadings and the evidence in this case, James Spain, the woods foreman, and the plaintiff were fellow-servants, employed by the same employer in the same general business, and that the defendant, therefore, is not responsible for any negligence on the part of said James Spain, even if the evidence discloses any such negligence.

If, therefore, the injury to plaintiff complained of was due wholly to the negligence of said James Spain, your verdict must be in favor of defendant.”

Excepted to as defendant's exception number 42.

43. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I instruct you as matter of law that under the pleadings and [117] the evidence in this case, Gordon, Laird and Carey were fellow-servants of plaintiff, employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such.”

Excepted to as defendant's exception number 43.

44. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I instruct you that under all the evidence in this case your verdict must be in favor of the defendant.”

Defendant's exception No. 44.

45. And defendant specifies that said verdict is against law in this, that said verdict should have been in favor of the defendant herein.

Excepted to as defendant's exception number 45.

45. In entering judgment herein.

Excepted to as defendant's exception number 45.

And defendant specifies that the evidence was insufficient to justify the verdict in that it appears that none of the injuries alleged to have been suffered by plaintiff were directly or proximately or at all caused by, or resulted from, the alleged acts or omissions on the part of the defendant charged in the complaint, but that it appears on the contrary that said injuries were brought on plaintiff by his own acts, and by the acts of other persons than this defendant.

AND NOW, IN ORDER that the foregoing may appear of record, defendant presents this as its Bill of Exceptions on its appeal from the judgment herein, and asks that the same may be settled and allowed as so presented.

Dated Sept. 28, 1912.

OTTO GREGOR,
MAHAN & MAHAN,
KENNETH KNEWETT, Jr., and
LILIENTHAL, McKINSTRY & RAY-
MOND,

Attorneys for Defendant. [118]

The above and foregoing Bill of Exceptions may be settled and allowed.

PUTER & QUINN,
Attorneys for Plaintiff.

OTTO C. GREGOR,
MAHAN & MAHAN,
KENNETH KNEWETT, Jr.,
LILIENTHAL, McKINISTRY & RAY-
MOND,

Attorneys for Defendant.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing bill of Exceptions to be used upon the appeal from the judgment herein is settled and allowed.

October 15, 1912.

JOHN J. DE HAVEN,
Judge.

Proposed Bill of Exceptions was served on Sept. 28, 1912.

[Endorsed]: Filed Oct. 15, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [119]

*In the District Court of the United States, Northern
District of California, Second Division.*

AT LAW.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Petition for Writ of Error.

Now comes Metropolitan Redwood Lumber Company, a corporation, defendant herein, and says that on or about the 25th day of July, 1912, this Court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear

from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a Writ of Error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of error so complained of, and that a transcript of the record with proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order may be made fixing the amount of the security which the defendant shall give and furnish upon said Writ of Error, and that upon giving such security, all further proceedings in this Court be suspended and stayed until the termination of said Writ of Error by the United States Circuit Court of Appeals.

LILIENTHAL, McKINSTRY & RAY-
MOND,

Attorneys for Said Defendant.

[Endorsed]: Filed Sep. 24, 1912. Jas. P. Brown,
Clerk. By C. W. Calbreath, Deputy Clerk. [120]

*In the District Court of the United States, Northern
District of California, Second Division.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Assignment of Errors.

Defendant Metropolitan Redwood Lumber Company, in connection with its Petition for Writ of Error herein, makes the following assignment and specifications of error, to wit:

I. The Court erred in overruling the Demurrer to plaintiff's complaint, made upon the ground that said Complaint did not state facts sufficient to constitute a cause of action against said defendant

II. The Court erred in overruling this defendant's Demurrer upon the ground that several causes of action had been improperly united in plaintiff's complaint.

III. The Court erred in permitting plaintiff to file an Amended Complaint herein.

IV. The Court erred at the trial of said action, in the following particulars, to each of which said errors defendant at said trial duly excepted:

1. In overruling defendant's objection to the following question asked witness Hugh Davis:

Q. Were you told to go by Mr. Spain and where to work?

A. Yes, sir, I was told by Mr. Spain that I belonged here at this place. [121]

Q. Do you remember the incident of his telling you that? A. Yes, sir.

Q. Go on and state just what he told you.

Excepted to as defendant's exception number 1.

2. In denying the motion to strike out the answer of witness Davis to the question:

Q. He told you that was the place for you to stand where you could see the log and give the signal?

A. Yes, sir, see the log and give the signal to the engineer at the same time.

Excepted to as defendant's exception number 2.

3. In overruling defendant's objection to the following question asked witness Paul Laird:

WITNESS.—The hook-tender instructed us to make that strap.

Q. What was his name?

Excepted to as defendant's exception number 3.

4. In denying defendant's motion to strike out the following answer to the above question:

A. His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of.

Excepted to as defendant's exception number 4.

5. In overruling defendant's objection to the following question asked witness Laird:

Q. Will you go on and state the condition of that cable, the condition the cable was in when you made the strap out of it, the condition of the piece of cable that you made the strap of?

A. Well, it was a very poor piece of line in my estimation.

Excepted to as defendant's exception number 5.

6. In overruling defendant's objection to the following [122] question asked witness Laird:

Q. After you had made this strap and before the accident, did you have any conversation with the hook-tender, Mr. Gordon, in reference to the strap?

Excepted to as defendant's exception number 6.

7. In overruling defendant's objection to the following question asked witness Laird:

Q. Did he give you the reason, did he state to you why he was not permitted to use new line?

A. Well, this line we used was not fit to be used, he said.

Excepted to as defendant's exception number 7.

8. In denying the motion to strike out the answer of witness Laird to the question:

Q. Go on and state what he said about that.

A. Well, in our conversation, whatever it was, I don't distinctly remember at present, he said he wanted to get a new piece out of the new line, but they would not stand for it, they said use the old line, the old line was good enough. He didn't say who it was.

Excepted to as defendant's exception number 8.

9. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception number 9.

10. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception number 10.

11. In giving to the jury over the objection of defendant, the following instruction:

"The plaintiff *seeks* in this action *seeks* to recover damages from defendant by reason of certain injuries alleged to have been suffered by him, and which it is charged were occasioned by the negligence of the defendant. The particular charge is that the defendant carelessly and negligently failed and neglected to provide and maintain [123] a safe and suitable 'Tommy Moore' strap, and on the 15th day of August, 1910, the said 'Tommy Moore' strap was in an unsafe and defective condition; that it was unsafe, defective and dangerous in this, that said

strap was made out of an old, badly worn, weak and rusty cable, and did not possess sufficient tensile strength to withstand the strain that was placed upon it."

Excepted to as defendant's exception number 11.

12. In giving to the jury, over the objection of defendant, the following instruction:

"Now, the burden of proof is upon the plaintiff to sustain these allegations. He must sustain them by a preponderance of the evidence, and before you would be warranted in returning a verdict for the plaintiff you must be satisfied that the injury sustained by plaintiff was by reason of having in use a defective strap, one that was not reasonably safe for use."

Excepted to as defendant's exception number 12.

13. In giving to the jury, over the objection of defendant, the following instructions:

"You are instructed, gentlemen, that you are the exclusive judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them."

Excepted to as defendant's exception number 13.

14. In giving to the jury, over the objection of defendant, the following instruction:

"You are not bound to believe anything to be a fact because a witness has stated it to be so, or to take the testimony of any witness as absolutely true, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken as to the matters testified to by him, or that for any reason his testimony is untrue or unreliable.

The substance of that instruction [124] is simply, gentlemen, that you should believe those witnesses whom you do believe, and act upon their testimony; the testimony that you do not believe you will reject from your consideration."

Excepted to as defendant's exception number 14.

15. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employee is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they have been so furnished and provided, and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care."

Excepted to as defendant's exception number 15.

16. In giving to the jury, over the objection of

defendant, the following instruction :

“An employee is not bound to know or inquire whether the machinery, appliances or structures furnished him by the master are unsafe or unsound, because there is an implied undertaking upon the part of the employer that all that can be reasonably done by the exercise of ordinary care has been done to render the machinery, appliances or structures reasonably safe. The employee has a right to [125] rely upon his employer's care and judgment in matter of providing reasonably safe machinery, appliances or structures, and may rightfully assume that the employer has exercised ordinary care in these respects, and that such machinery, appliances or structures furnished by the employer to be used by him in the business are reasonably safe and secure, unless he knows to the contrary. Of course, if by working with them his attention is called to the fact that it is unsafe and dangerous, then as a matter of course he is required to act upon that knowledge.

Excepted to as defendant's exception number 16.

17. In giving to the jury, over the objection of defendant, the following instruction :

“I instruct you that if you find from a preponderance of the evidence that at the time the plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable ‘Tommy Moore’ strap, and

that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said 'Tommy Moore' strap, if such condition you find existed, then, unless plaintiff, through negligence, contributed to such injury, your verdict must be for the plaintiff."

Excepted to as defendant's exception number 17.

18. In giving to the jury, over the objection of defendant, the following instruction:

"You are instructed that the burden of proof rests upon defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of assumption of risk, which the defendant [126] alleges as a defense in the action.

Excepted to as defendant's exception No. 18.

19. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that the burden of proof rests upon the defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of contributory negligence which is alleged by the defendant as a defense."

Excepted to as defendant's exception number 19.

20. In giving to the jury, over the objection of defendant, the following instruction:

"Of course a person employed to do work assumes the ordinary risks of such employment, and you are charged that the ordinary risks of the business in which one is employed are such as the employee is as likely to know as the master. They are such risks as can be reasonably foreseen and which are the nat-

ural and ordinary incidents of the work that the employee agrees to do, and which are liable to happen in the performance of such work, although the employer discharges his duty and exercises due care.”

Excepted to as defendant's exception number 20.

21. In giving to the jury, over the objection of defendant, the following instruction:

“The rule that the servant takes the ordinary risks of the business presupposes that the master will perform the duty of caution which the law casts upon him. It is those risks alone which cannot be obviated by the use of ordinary care by the master, that the servant assumes.”

Excepted to as defendant's exception number 21.

22. In giving to the jury, over the objection of the defendant, the following instruction: [127]

“A person who enters the service of another assumes all the ordinary risks incident to the employment in which he is engaged. While this is the law upon this subject, it is qualified by the rule that the employer is charged in law with the duty of not subjecting his employee to risks by his own negligence.”

Excepted to as defendant's exception number 22.

23. In giving to the jury, over the objection of the defendant, the following instructions:

“Under this rule the employer is required to use ordinary care not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence di-

rectly or proximately causes injury to the employee, he is responsible to the person injured, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which the employee was engaged were unsafe or unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continued in the use thereof."

Excepted to as defendant's exception number 23.

24. In giving to the jury, over the objection of the defendant, the following instruction:

"You are further instructed that knowledge by an employee injured, of the defective or unsafe condition or character of any machinery, ways, appliances or structures of such employer, shall not be a bar to a recovery for any injury caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same [128] or continued in the use thereof."

Excepted to as defendant's exception number 24.

25. In giving to the jury, over the defendant's objection, the following instruction:

"You are charged that should you find from the evidence that the injuries complained of by the plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not en-

titled to recover in this action, and it becomes your duty to find a verdict in favor of the defendant."

Excepted to as defendant's exception number 25.

26. In giving to the jury, over the defendant's objection, the following instruction:

"In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of all the other facts and circumstances, you find that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injury complained of, then I charge you that plaintiff was guilty of contributory negligence and cannot recover in this action, and you must return a verdict in favor of the defendant."

Excepted to as defendant's exception number 26.

27. In giving to the jury, over the defendant's objection, the following instruction:

"In this action the plaintiff, if he has shown himself entitled to recover all damages shown by the evidence which he has suffered up to the time of the trial, which were proximately caused by said injury whether they could have been anticipated or not, and all damages which it is reasonably probable that he will sustain in the future by reason of the [129] said injury not exceeding the amount demanded in the complaint.

In estimating the compensatory damages in cases of this character, all of the proximate consequences

of the injury shown by the evidence, future as well as past, are to be taken into consideration, including the bodily pain which resulted from the injury, the impairment of physical powers, the impairment of the plaintiff's power to labor and earn his living, and he should be awarded, if entitled to a verdict at all, sufficient to compensate him for all proximate detriment shown by the evidence, past and prospective.

These are intended to include and embrace indemnity for loss of power or loss of capability to perform ordinary labor, or the capacity to earn money, and reasonable satisfaction for loss of physical power if shown by the evidence, always keeping in mind the fact that the plaintiff is not entitled to recover what is known as exemplary damages; simply damages which in your judgment would reasonably compensate him for the injuries he has sustained, if this defendant is liable therefor. The elements of damage are in their very nature not susceptible of any precise or exact compensation, and the determination of the amount is committed to the sound judgment and the good sense of the jury, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for the detriment proximately caused by such injury, and shown by the evidence, not exceeding the amount claimed in the complaint."

Excepted to as defendant's exception number 27.

28. In giving to the jury, over the defendant's objection, the following instruction:

"In addition to these instructions, I will give you

the following: An employer is not bound to indemnify his employees for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence [130] of another person employed by the same employer in the same general business, provided, nevertheless, an employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured."

Excepted to as defendant's exception number 28.

29. In giving to the jury, over the defendant's objection, the following instruction:

"The evidence in this case shows without any conflict, that if there was any negligence in the construction or use of this 'Tommy Moore' strap, that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible."

Excepted to as defendant's exception number 29.

30. In refusing to give to the jury at the request of defendant, the requested instruction, as follows:

"In the present case plaintiff seeks to recover damages against defendant by reason of certain injuries alleged to have been suffered by plaintiff, and which it is alleged were occasioned by the negligence of defendant."

Excepted to as defendant's exception number 30.

31. In refusing to give to the jury, at the request

of defendant, the requested instruction, as follows:

“I charge you that in a civil action such as the present one the burden of proof is on the plaintiff, and further, that in this action, in order to recover, the plaintiff is compelled to prove each and every material allegation in his complaint by a preponderance of evidence, and if you find that plaintiff has failed so to do, you the jury must find a verdict in favor of the defendant.”

Excepted to as defendant's exception number 31.
[131]

32. In refusing to give to the jury, at the request of the defendant, the requested instruction, as follows:

“I charge you that in passing upon the evidence adduced by the plaintiff nothing is to be assumed or taken for granted in plaintiff's favor; that is to say, the law requires that plaintiff must prove his case to the satisfaction of the jury, by a preponderance of the testimony. If, then, you should find that the plaintiff has failed to prove any material allegation of his complaint by a preponderance of the testimony to your satisfaction, or if you should find that the testimony is equally balanced upon any particular fact essential to plaintiff's case, or if you should find that the weight of the testimony is against the truth of such allegation or fact, then plaintiff has failed to prove such allegation or fact, in the manner the law requires.”

Excepted to as defendant's exception number 32.

33. In refusing to give to the jury, at the request of defendant, the requested instruction as follows:

“I instruct you that by the term ‘risks of business’ are meant such risks as the employee is as likely to know as the master, and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work, or which are liable to happen from the negligence or carelessness of a fellow-employee engaged in the same general business. In connection with the foregoing I instruct you that a servant entering into employment assumes the ordinary risks incident to such employment, and among such risks and as part of the same the employee assumes the danger of injury arising from working in a dangerous place, where the danger incident to working in such place is fully known, comprehended and appreciated by the servant, and further, such servant also assumes the danger of receiving injury from the negligence of a fellow-servant or workman engaged in the same occupation [132] or business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or *employee* or unless the employer has neglected to use ordinary care in the selection of the culpable employee.

If, therefore, you find from the evidence that the plaintiff received the injuries complained of while in the employ of defendant and that such injuries were occasioned by the happening of an event which was one of the risks of the business in which said plaintiff was engaged, then I charge you that plaintiff is not entitled to recover in this action, and your

verdict must be in favor of defendant.

Excepted to as defendant's exception number 33.

34. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of defendant. In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of all the facts and circumstances of the case, you find from the evidence that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injuries complained of, then I charge you that plaintiff was guilty of negligence, and cannot recover in this action, and you must return a verdict in favor of the defendant."

Excepted to as defendant's exception number 34.

35. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:
[133]

"I charge you that if the injury to the plaintiff complained of was not the natural or probable or proximate consequence of the negligent act of the defendant, there can be no recovery in this action.

If, therefore, you find from a preponderance of

the evidence that the defendant was negligent in failing to exercise reasonable care to furnish the plaintiff with a reasonably safe 'Tommy Moore strap,' yet if you also find from a preponderance of the evidence that such failure to furnish said 'strap' on the part of the defendant that was not the natural or probable or proximate cause of the injury complained of, but that the proximate cause of the injury to plaintiff was the fact that said plaintiff voluntarily assumed a position near said strap which he knew to be dangerous, and that he fully understood, comprehended and appreciated the danger of such position, then, under such circumstances, your verdict must be for the defendant."

Excepted to as defendant's exception number 35.

36. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that where a person undertakes to work in a place where conditions or danger are liable to occur in the ordinary prosecution of the work, and he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is deemed to assume the perils incident to the employment and can recover from the employer compensation for injuries resulting therefrom.

If, therefore, you find from the evidence that the plaintiff undertook to work for the defendant at a place near the 'Tommy Moore strap' and that such

place was a dangerous place in the ordinary prosecution of the work and that plaintiff at and before the time of [134] the injury had knowledge of such dangers, or that his facilities for seeing or discovering them were just as good as those of the defendant, and that he undertook and continued until the time of the injury in the work with the knowledge or opportunity for ascertaining those dangers, then I instruct that, under such circumstances, plaintiff assumed the risks of such employment and cannot recover from the defendant for injuries resulting therefrom."

Excepted to as defendant's exception number 36.

37. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that an employee by entering or continuing in the employment of his employer without complaint, assumes the risks and dangers of the service which he knows and fully understands, comprehends and appreciates.

If, therefore, you find from the evidence that the plaintiff had for a period of time prior to the injury had charge of the 'Tommy Moore' and had worked on or about said 'Tommy Moore strap' and had prior thereto worked in similar positions with other crews employed by the same defendant; and if you further find that from such experience the said plaintiff at the time of the injury fully understood, comprehended and appreciated the risk and danger of the service he was performing and the risk and danger of the breaking of said Tommy Moore strap, and that said plaintiff continued in said employment up

to the time of the injury without making any complaint whatever, then I instruct you that, under such circumstances, the said plaintiff assumed the risk and danger arising from the breaking of said Tommy Moore strap and cannot recover in this action.

Excepted to as defendant's exception number 37.

38. In refusing to give to the jury, at the request of defendant, the requested instruction as follows:

"I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has its reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for the use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, then, under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the employees and not that of the employers.

If, therefore, in this case you find from the evidence that the defendant did exercise ordinary care in furnishing reasonably [135] safe and suitable material for the construction of 'Tommy Moore strap' to be used by its employees in constructing such straps for use in work, the character or place of which necessarily changed as the work progressed, and that certain of such employees of defendant being fellow-servants of plaintiff employed by the

same defendant in the same general business, did in the course of their duty construct the 'Tommy Moore strap' which broke and injured plaintiff, out of the material furnished by defendant, and if you further find that in so constructing said strap said fellow-employees of defendant negligently selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow-servants in so negligently selecting defective material in the construction of said strap, then I charge you that, under such circumstances, such negligence would be the negligence of fellow-servants of plaintiff and your verdict should be for defendant."

Excepted to as defendant's exception number 38.

39. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work, including the maintenance of the place in such reasonably safe condition, nevertheless such duty of maintenance is not so absolute as to charge the employer with liability for injuries to employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of work are assumed by the employees there employed."

Excepted to as defendant's Exception Number 39.

40. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that a lumber company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its employees no duty to adopt a different method, and it is not guilty of negligence for a failure to do so."

Excepted to as defendant's Exception Number 40.

41. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that as between employer and employee the duty of so using a reasonably safe place; or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master.

If, therefore, you find from the evidence that the injury to plaintiff complained of was due wholly to the negligence of the fellow-servants of said plaintiff employed by the same defendant in the same general business, in negligently failing to conform to an established and reasonably safe method of work or in negligently using a reasonably safe place, then, under such circumstances, your verdict must be for the defendant."

Excepted to as defendant's Exception Number 41.

42. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

“I instruct you as matter of law that under the pleadings and the evidence in this case, James Spain, the woods foreman, and the plaintiff were fellow-servants employed by the same employer in the same general business, and that the defendant, therefore, is not responsible [137] for any negligence on the part of said James Spain, even if the evidence discloses any such negligence.

If, therefore, the injury to plaintiff complained of was due wholly to the negligence of said James Spain, your verdict must be in favor of defendant.”

Excepted to as defendant’s Exception Number 42.

43. In refusing to give to the jury, at the request of defendant, the requested instructions, as follows:

“I instruct you as a matter of law that under the pleadings and the evidence in this case, Gordon, Laird and Carey were fellow-servants of plaintiff employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such.”

Excepted to as defendant’s Exception Number 43.

44. In refusing to give to the jury, at the request of the defendant, the requested instruction, as follows:

“I instruct you that under all the evidence in this case, your verdict must be in favor of the defendant.”

Excepted to as defendant’s Exception Number 44.

45. And defendant specifies that said verdict is against law in this, that said verdict should have been in favor of the defendant herein.

Excepted to as defendant's Exception Number 45.

46. In entering judgment herein in favor of plaintiff.

Excepted to as defendant's Exception Number 46.

And defendant specifies that the evidence was insufficient to justify the verdict in that it appears that none of the injuries alleged to have been suffered by plaintiff were directly or proximately or at all caused by, or resulted from, the alleged acts or omissions on the part of the defendant charged in the complaint, but that it appears, on the contrary, that said injuries were brought on plaintiff by his own acts, and by the acts of other persons than this defendant. [138]

WHEREFORE SAID DEFENDANT PRAYS that the judgment of the District Court of the United States in and for the Northern District of California herein be reversed and set aside.

LILIENTHAL, McKINSTRY & RAYMOND,

Attorneys for said Defendant.

[Endorsed]: At 3 o'clock and 25 min. P. M. Filed Sep. 24, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [139]

In the District Court of the United States, Northern District of California, Second Division.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

**Order Directing Filing of Bond on Writ of Error
and Staying Further Proceedings.**

The defendant Metropolitan Redwood Lumber Company, having filed its petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed:

NOW, THEREFORE, IT IS ORDERED, that upon the said defendant Metropolitan Redwood Lumber Company filing with the clerk of this court a good and sufficient bond in the sum of Fifteen Thousand Dollars, to the effect that if said defendant Metropolitan Redwood Lumber Company and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the said obligation is to be void; otherwise [140] to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be, and they are hereby, suspended and stayed until the termination of said writ of error by the said United

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States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated September 24th, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Oct. 1, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [141]

*In the District Court of the United States, Northern
District of California, Second Division.*

AT LAW.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

Upon motion of attorneys for the defendant herein, and upon filing a petition for a Writ of Error and an Assignment of Errors,

IT IS ORDERED that a Writ of Error be, and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit the judgment heretofore rendered herein, and the other matters and things in said petition and assignment set forth, and that the amount of bond on said Writ of Error be and hereby is fixed at Five Hundred Dollars.

Dated September 24th, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Oct. 1, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [142]

Bond on Writ of Error.

Know All Men by These Presents: That we, Metropolitan Redwood Lumber Company, a corporation, as principal, and The United States Fidelity & Guaranty Co., a corporation, as surety, are held and firmly bound unto Hugh Davis in the full and just sum of Five Hundred (500) Dollars, to be paid to the said Hugh Davis, his certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of September, 1912.

WHEREAS, lately at a District Court of the United States, for the Northern District of California, in a suit pending in said court, between said Hugh Davis, plaintiff, and said Metropolitan Redwood Lumber Company, defendant, a judgment was rendered against the said Metropolitan Redwood Lumber Company, and the said Metropolitan Redwood Lumber Company having obtained from said Court a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said Hugh Davis, citing and admonishing him to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OB-

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LIGATION IS SUCH, that if the said Metropolitan Redwood Lumber Company shall prosecute its Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal] METROPOLITAN REDWOOD LUMBER COMPANY.

By THOS. G. ATKINSON,
Pres.

[Seal] THE UNITED STATES FIDELITY & GUARANTY CO.

By PETER BELCHER,
Attorney in Fact. [143]

State of California,
County of Humboldt,—ss.

On this 27th day of September, A. D. 1912, before me, I. R. Belcher, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Peter Belcher, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company, and the said Peter Belcher acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereunto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office in the county of Humboldt, the day and year in this

certificate first above written.

[Seal] I. R. BELCHER,
Notary Public in and for said Humboldt County,
State of California.

The foregoing bond is approved as to form and
sufficiency of surety this 1st day of October, 1912.

JOHN J. DE HAVEN,
Judge.

Filed Oct. 1, 1912. Jas. P. Brown, Clerk. By J.
A. Schaertzer, Deputy Clerk. [144]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court of the United States, Northern
District of California, Second Division.*

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Defendant.

I, W. B. Maling, Clerk of the District Court of the
United States, in and for the Northern District of
California, do hereby certify the foregoing one hun-
dred and forty-four (144) pages, numbered from 1
to 144, inclusive, to be a full, true and correct copy
of the record and proceedings in the above and
therein entitled cause, as the same remains of rec-
ord and on file in the office of the clerk of said court,
and that the same constitutes the return to the an-

nexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$86.80, that said amount was paid by Lilienthal, McKinstry & Raymond, attorneys for the defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of December, A. D. 1912.

[Seal] W. B. MALING,
Clerk of United States District Court, Northern District of California.

[Seal] By J. A. Schaertzer,
Deputy Clerk. [145]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Metropolitan Redwood Lumber Company, a corporation, plaintiff in error, and Hugh Davis, defendant in error, a manifest error hath happened, to the great damage of said Metropolitan Redwood Lumber Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceeding aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

J. A. S.
D. C.

JOHN J. DE
Witness, the Honorable ~~EDWARD D.~~
HAVEN, United States District Judge,
~~WHITE, Chief Justice of the United States,~~
Northern District of California, the 1st day of October, in the year of our Lord one thousand nine hundred and twelve.

[Seal]

JAS. P. BROWN,
Clerk of the United States District Court, 9th Judicial Circuit, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

JOHN J. DE HAVEN,
District Judge. [146]

Due service of the within Writ of Error is hereby admitted this 7th day of October, 1912.

PUTER & QUINN,
Attorneys for Plaintiff, Hugh Davis.

[Endorsed]: 15,390. In the District Court of the United States, Northern District of California, Second Division. Hugh Davis, Plaintiff, vs. Metropolitan Redwood Lumber Company, a Corporation, Defendant. Writ of Error. Filed Oct. 1, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

W. B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Hugh Davis.
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Metropolitan Redwood Lumber Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand at the city of San Francisco, in the District above named, this 24th day of September, A. D. 1912.

JOHN J. DE HAVEN,

Judge.

Due service of the within Citation upon Writ of Error is hereby admitted this 7th day of October, 1912.

PUTER & QUINN,

Attorneys for Plaintiff, Hugh Davis.

[Endorsed]: 15,390. In the District Court of the United States, Northern District of California, Sec-

ond Division. Hugh Davis, Plaintiff, vs. Metropolitan Redwood Lumber Company, a Corporation, Defendant. Citation upon Writ of Error. Filed Oct. 11, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk.

[Endorsed]: No. 2204. United States Circuit Court of Appeals for the Ninth Circuit. Metropolitan Redwood Lumber Company, a Corporation, Plaintiff in Error, vs. Hugh Davis, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed December 7, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —.

METROPOLITAN REDWOOD LUMBER COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

**Order Extending Time [to November 23, 1912] to
File Record Thereof and to Docket Cause.**

Good cause appearing therefor, it is ordered that

the plaintiff in error in the above-entitled cause may have to and including November 23, 1912, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 23, 1912.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 23, 1912. F. D. Monekton, Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. —.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

**Order Extending Time [to December 7, 1912] to
File Record Thereof and to Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including December 7, 1912, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 21, 1912.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 21, 1912. F. D. Monckton, Clerk.

[Endorsed]: No. 2204. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Refiled Dec. 7, 1912. F. D. Monckton, Clerk.

[Notice of Attorneys for Defendant in Error.]

United States Circuit Court of Appeal, for the Ninth Circuit.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

To the Honorable, United States Circuit Court of Appeal for the Ninth Circuit, and to Frank D. Monckton, Clerk of Said Court:

You will please take notice that the attorneys for the defendant in error in the above-entitled action are Messrs. Puter & Quinn, whose addresses are Nos. 616 Fourth Street, Eureka, California.

Dated October 19th, 1912.

PUTER & QUINN,

Attorneys for Defendant in Error.

HUGH DAVIS,

Defendant in Error.

[Endorsed]: No. 2204. United States Circuit Court of Appeal for the Ninth Circuit. Metropolitan Redwood Lumber Company (a Corporation), Plaintiff in Error, vs. Hugh Davis, Defendant in Error. Notice of Names and Addresses of Attorneys. Due service admitted this 22d day of October, 1912. Otto C. Gregor, Mahan & Mahan, Kenneth Knewett, Jr., Lilienthal, McKinstry & Raymond, Attorneys for Plaintiff in Error. Filed Oct. 24, 1912. F. D. Monckton, Clerk. Refiled Dec. 7, 1912. F. D. Monckton, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NORTH JUDICIAL
CIRCUIT.

METROPOLITAN REDWOOD LUMBER
COMPANY

(a corporation),

Plaintiff in Error.

(Defendant below)

vs.

HUGH DAVIS

Defendant in Error.

(Plaintiff below.)

IN ERROR TO THE CIRCUIT COURT OF THE
UNITED STATES FOR THE NORTHERN
DISTRICT OF CALIFORNIA.

STATEMENT OF THE CASE.

The defendant in error (plaintiff below) brought this action against the plaintiff in error (defendant below), to recover damages suffered in consequence of injuries received by being struck upon the leg by a parted "Tommy Moore" strap used in logging operations.

The plaintiff in error carries on a lumber mill and logging operations at Metropolitan, Humboldt County, California, and in its business of logging is obliged to

drag logs over the uneven and rough surface of the ground to its landings along the railroad whence they are forwarded by railroad train to the mill.

Inasmuch as the surface conditions are such that it is rarely possible to obtain a direct straight course over which to conduct the logs, it is necessary to frequently use an instrument known as a "Tommy Moore," which, in effect, is in the nature of a large block, for the purpose of changing the course of direction of the approaching log. This "Tommy Moore" is fastened to a convenient stump by means of a wire cable, commonly spoken of as a "Tommy Moore strap."

The appropriate length of the strap is dependent upon the size of the stump around which said strap is to be placed, and the distance the "Tommy Moore" is to be located from said stump, all of which is to be determined each time a new layout is made or a "Tommy Moore" is to be set; that is to say, if logs are to be hauled from a certain point the donkey engine is usually set on a landing, and the main line or cable is stretched to the place from which the logs are to be hauled. Owing to the broken surface conditions of the ground, a change of direction in which the log is to be hauled is often necessary, and at each angle a "Tommy Moore" is set, by fastening it to some convenient stump. The cable by which the "Tommy Moore" is fastened to the stump is called a "Tommy Moore strap" and consists of a piece of cable, or wire rope of sufficient length, with an eye splice in each end, which ends are attached to the "Tommy Moore" and the loop placed over and around a stump. Meanwhile the main cable directly attached at

one end to the log runs through the wheel of the "Tommy Moore," while the other end is attached to the spool of the steam donkey.

At the time he was injured defendant in error was working with the rigging crew as a "chaser," his duties being to watch the log through the "Tommy Moore" and signal to the engineer to stop the power or put it on. In other words, to tend the "Tommy Moore," to care for it, etc. (Transcript pp. 56 and 57)

He was an experienced woodsman, having been employed in the woods since 1906, and had worked from the 1st of April, 1910, until the 15th of August, 1910 the day of the injury, with the rigging crew (Tr. p. 63).

In order to facilitate the disconnection of the main cable and the "Tommy Moore" after the log had reached the "Tommy Moore" and was about to change its direction toward the landing, there was what was termed a "tag line," i. e., a cable about ten feet in length connected with the "choker" around the log and the end of the main cable. As soon as this "tag line" passed through the "Tommy Moore," the "chaser" would signal the engineer to stop.

He would then remove the "tag line" and connect the main cable directly to the "choker," signal the engineer to go ahead, and the log would assume its direct course to the landing. (Tr. p. 64).

At the time of the injury when defendant in error was in a position near the "Tommy Moore" (Tr. p. 60), the "Tommy Moore" strap broke and, swinging around the stump struck defendant in error and caused the injuries complained of.

In the amended complaint of defendant in error, his entire action is based upon the theory that plaintiff in error failed in its duty to him in not providing a reasonably safe appliance, i. e., a safe "Tommy Moore strap." In other words, he presents a cause of action cognizable under Section 1971 of the Civil Code of California, which provides that

"An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care."

The gist or gravamen of the action is contained in paragraphs IV, V, VI and VII (Tr. pp. 28 and 29) of the amended complaint, and are as follows:

IV.

That the said "Tommy Moore strap" was so carelessly and negligently made and constructed by the said defendant, that the said "Tommy Moore strap," at the time the plaintiff was injured by the breaking of said "Tommy Moore strap" as hereafter alleged, was dangerous to use and operate in holding and keeping said "Tommy Moore" in place, and in that behalf plaintiff alleges: that said defendant carelessly and negligently made and constructed said "Tommy Moore strap" out of an old, rusty, badly worn cable, about one inch in diameter that did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said saw logs were being hauled or dragged as aforesaid.

V.

That common, ordinary care and reasonable care and prudence required and demanded that said "Tommy Moore strap" should be made and constructed of wire rope, having sufficient tensile strength to hold said "Tommy Moore" in place and

withstand the strain thereon while said saw log was being hauled or dragged along said road or drag-way as aforesaid.

VI.

That said defendant carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore strap" as aforesaid, and on the 15th day of August, 1910, and at all times herein mentioned, said "Tommy Moore strap" was in an unsafe, dangerous and defective condition.

VII.

That said defendant so carelessly and negligently made, constructed, kept and maintained said "Tommy Moore strap" as aforesaid, that the same was, on the 15th day of August, 1910, and for a long time prior thereto, in an unsafe, defective and dangerous condition, in this that the said "Tommy Moore strap" was made out of an old, badly worn, weak, rusty cable about one inch in diameter, that did not have or possess sufficient tensile strength to withstand the strain thereon, when said "Tommy Moore" was being used as aforesaid, and had no means of protection to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said "Tommy Moore strap" should give way or break.

The issues were definitely made up upon this complaint. The plaintiff in error came into Court prepared solely to meet such issues and had a right to rely on the fact that no other issue would be presented or tried. Yet at the trial the defendant in error wholly abandoned his cause of action set forth in the complaint and presented a cause based on the theory that the injury was due, not to the negligence of the plaintiff in error, but entirely due to the negligence of one Gordon, the hook

tender, the man in charge of the crew of five men with whom defendant in error worked, and who was under the immediate supervision of Spain, the woods foreman. (Tr. p. 69).

That is to say, while pleading a cause under the general and common law liability and as based upon Section 1971 of the Civil Code defendant in error has recovered a judgment under an entirely different cause of action, i. e., a cause of action based entirely upon that portion of the amendment of 1907 to 1970 of the Civil Code which reads:

The employer shall be liable for such injury when the same results from the wrongful act, neglect or default * * * of a person employed by such employer having the right to control or direct the services of such employee injured.

In other words, the plaintiff in error appeared prepared to meet and did meet fully, not only by its own evidence, but by the unanimous voice of the witnesses for defendant in error, all issues tendered by the complaint, but as the pleadings gave no intimation whatever to the effect that defendant in error intended to depart from his pleadings and present a cause of action wholly based on Gordon's negligence, the plaintiff in error was left entirely without any witnesses upon such issue; it did not have an opportunity to produce even Gordon himself to tell his story, with the result that for an injury to a leg which his physician pronounced nearly well at the time of the trial (Tr. p. 55), the jury awarded a verdict of ten thousand (\$10,000.00) dollars, outrageously incommensurate with the damage even in a clear undisputed case of negligence.

In this case the evidence showed absolutely without conflict that the only duty of the plaintiff in error was to furnish reasonably safe and suitable material, i. e. wire rope, out of which the workmen themselves were to construct the strap. From the very nature of the business, this method was necessary; for, in the frequent moving and readjustment of the "Tommy Moore" to new ground and stump conditions, the strap necessarily had to be of different lengths.

The defendant in error testifies (Tr. p. 65):

Two fellows by the names of Carey and Laird
 * * * I know they made it (the strap) * * *
 They were members of the crew I was working with
 * * * Well, it (i. e., the "Tommy Moore strap")
 was made out of material they got from the com-
 pany. It was kept there what the company fur-
 nished and the members of the crew selected from
 that material and made the strap.

Again the defendant in error testifies (Tr. p. 69):

The hook tender, his name was Gordon, and a fel-
 low named Mike Carey and Mr. Laird and the
 engineer, his name was Brunius. The whistle boy
 was up in the woods. That composed the whole
 crew. The hook tender (Gordon) had charge of the
 crew * * * He was under Spain, the foreman.

Paul Laird testified (Tr. p. 71):

Two other fellows and myself made that strap
 * * * The hook tender instructed us to make that
 strap * * * His name was Gordon. Gordon was the
 boss of the crew. Gordon pointed the cable out to
 me. He showed us the cable to make the strap of.

This witness also testified that the strap which in-
 jured defendant in error was made after a certain
 Tacoma donkey had arrived, but before this Tacoma

donkey had gone to work. That there came with the Tacoma donkey a large amount of main line cable; that there was so much of this cable that it could not be wound on the drum and quite a bit had to be cut off, and was left in the neighborhood. (Tr. p. 76).

In other words, Laird, the first witness called by defendant in error admits the fact which is undisputed and confirmed throughout the case, that at the very time Gordon instructed Laird to select the defective piece of rope out of which to make the strap, the plaintiff in error had furnished him a large amount of *absolutely new* cable, which he was at liberty to use for that purpose.

Michael Carey for defendant in error testified (Tr. p. 80):

The chain tender (Gordon) told me to take that strap * * * He showed us what piece to take * * * (Tr. p. 78). Gordon was the foreman of that crew, and had full charge. It was his duty to make these straps when they broke, or when they were needed *and he could go ahead and take any material he could find that was sufficient for that purpose.*

Again (Tr. p. 81) Carey testified:

The new Tacoma donkey came a couple of weeks before the injury. Fourteen hundred feet of new rope or new cable came with that. Probably four or five hundred feet were cut off, because they could not get it on the drum. That remained around the landing. The "Tommy Moore strap" could have been made out of that if it was necessary. If Gordon had wanted to he could have made it out of that piece of new line.

The above witnesses were all called by the defendant in error.

James Spain, witness for plaintiff in error, testified (Tr. pp. 89 and 90):

Fourteen hundred feet of inch and a quarter main line came with the new donkey * * * This fourteen hundred feet of line was available for their use. There was other line there available for their use, two thousand feet of inch and a quarter across the track on the other donkey, probably 75 or 80 feet distant * * * I remember them getting ready and putting the new line upon the donkey. There was too much of it. * * * They cut off a piece 200 or 250 feet. That laid there along side of the donkey. That line was available for any purpose they wished to use it for. It was available for "Tommy Moore" straps, if they desired to use it * * * The hook tender, Gordon, had charge of the selection of the rope that was used for any purpose by the crew.

Again (Tr. p. 90) Spain testified:

The hook tender Gordon, had charge of the selection of the rope that was used for any purpose by the crew. Most anyone of the crew can make the "Tommy Moore" straps. All the rigging crew actually do make them, that is including Gordon and those under him.

Again (Tr. p. 91) Spain testified:

I have never given the hook tender or crew any instructions regarding what rope shall be used in their work. The hook tender has the discretion in the selection of any rope used by them. In this particular instance, Red Gordon was the hook tender. Red Gordon had the selection of any rope or cable that was used on these operations.

Again (Tr. p. 93) Spain testified:

The strap that went around that stump was twenty-five or thirty feet long. These straps would have different lengths, depending upon the location of the stump to the roadway. That is the reason the workmen had to make them themselves. They have to make a new "Tommy Moore" strap for each new direction in which they draw the logs, that is, unless it was a straight pull, or unless a former strap would answer the purpose. It is made with two eyes splices in it, one on each end, one eye splice on each end, and as the crew are directed to go, or as they go to different logging operations they themselves have to make a strap for each new situation.

SPECIFICATION OF ERRORS RELIED UPON.

I.

Error of the Circuit Court in denying the motion to strike out the answer of witness Laird to the question:

Q. Go on and state what he said about that?

A. Well, in our conversation, whatever it was, I don't distinctly remember at present; he said he wanted to get a new piece out of the new line but they would not stand for it. They said use the old line; the old line was good enough. He didn't say who it was.

Excepted to as Defendant's EXCEPTION NO. 8.

II.

Error of the Circuit Court in denying motion for non-suit at close of plaintiff's case on the grounds:

1st. That the evidence is not sufficient to justify a verdict in favor of the defendant in error under the pleadings in this case.

2nd. That there is a fatal variance between the pleadings and the proof.

3rd. That the defendant in error assumed the risks of his employment and that said injury occurred by reason of one of the assumed risks.

4th. That defendant in error was guilty of contributory negligence.

5th. That the injury was occasioned by the act of a fellow servant for which plaintiff in error was not responsible.

Excepted to as Defendant's EXCEPTION NO. 9.

III.

Error of the Circuit Court in denying motion for non-suit made at the close of the testimony in the case on the grounds:

1st. That the evidence is not sufficient to justify a recovery under the pleadings.

2nd. That there is a variance between the allegations and the proof.

3rd. That no recovery can be had for any alleged cause set forth in the amendment of the year 1907 to Section 1970 of the Civil Code of California.

4th. That the defendant in error was injured by the ordinary risks of the business which he had assumed.

5th. That defendant in error was guilty of contributory negligence.

6th. That any injury suffered by defendant in error was caused by the negligence of a fellow servant or fellow servants employed by plaintiff in error in the same general business.

Excepted to as Defendant's EXCEPTION NO. 10.

IV.

Error of Circuit Court in giving to the jury over the objection of plaintiff in error the following instruction:

I instruct you that if you find from a preponderance of the evidence that at the time plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable "Tommy Moore" strap, and that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said "Tommy Moore" strap, if such condition you find existed, then unless plaintiff through negligence contributed to such injury, your verdict must be for the plaintiff.

Excepted to as Defendant's EXCEPTION NO. 17.

V.

Error of Circuit Court in giving to the jury over the objection of plaintiff in error, the following instruction:

In addition to these instructions, I will give you the following: An employer is not bound to indemnify his employee for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed nor in consequence of the negligence of another person employed by the same

employer in the same general business, provided nevertheless an employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured.

Excepted to as Defendant's EXCEPTION NO. 28.

VI.

Error of Circuit Court in giving to the jury over the objection of plaintiff in error, the following instruction:

The evidence in this case shows without any conflict that if there was any negligence in the construction or use of this "Tommy Moore" strap, that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible.

Excepted to as Defendant's EXCEPTION NO. 29.

VII.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction, as follows:

I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has its reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for the use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances

themselves out of such material for such work, then under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the employees and not that of the employers.

If, therefore in this case you find from the evidence that the defendant did exercise ordinary care in furnishing reasonably safe and suitable material for the construction of "Tommy Moore" straps, to be used by its employees in constructing such straps for use in work, the character or place of which necessarily changed as the work progressed, and that certain of such employees of defendant being fellow servants of plaintiff employed by the same defendant in the same general business, did in the course of their duty construct the "Tommy Moore" strap which broke and injured plaintiff, out of the material so furnished by defendant, and if you further find that in so constructing said strap said fellow employees of defendant negligently selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow servants in so negligently selecting defective material in the construction of said strap, then I charge you that under such circumstances such negligence would be the negligence of fellow servants of plaintiff, and your verdict should be for defendant.

Excepted to as Defendant's EXCEPTION NO. 38.

VIII.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction as follows:

I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work, including the maintenance of the place in such reasonably safe condition, neverthe-

less, such duty of maintenance is not so absolute as to charge the employer with liability for injuries to employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of work are assumed by the employees there employed.

Excepted to as Defendant's EXCEPTION NO. 39.

IX.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction, as follows:

I instruct you as a matter of law that under the pleadings and the evidence in this case, Gordon, Laird and Carey were fellow servants of plaintiff employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such.

Excepted to as Defendant's EXCEPTION NO. 43.

X.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction as follows:

I instruct you that under all the evidence in this case your verdict must be in favor of the defendant.

Excepted to as Defendant's EXCEPTION NO. 44.

XI.

Error of Circuit Court in entering judgment herein.
Excepted to as Defendant's EXCEPTION NO. 45.

XII.

And plaintiff in error specifies that the evidence was insufficient to justify the verdict, in that it appears that none of the injuries alleged to have been suffered by defendant in error were directly or proximately, or at all caused by, or resulted from, the alleged acts, or omissions on the part of the plaintiff in error charged in the complaint, but that it appears on the contrary that said injuries were brought on defendant in error by his own acts, and by the acts of other persons than this plaintiff in error.

ARGUMENT.

The cause of action alleged in the amended complaint is manifestly a cause of action resting upon the *general and common law liability of master and servant*. In fact it would be difficult to conceive of language which would more directly rest a cause of action on the general and common law liability of master and servant than that contained in the amended complaint in this action.

It appears from the testimony without contradiction that plaintiff in error had fully complied with its duty in exercising ordinary care to furnish reasonably safe and suitable material out of which the employees themselves were to make the "Tommy Moore" straps. The fact that Gordon, a fellow servant, though superior in

rank, committed a negligent act in selecting a defective cable when there were ample brand new cable on hand, available for that purpose, cannot under the pleadings affix any liability upon the plaintiff in error.

The learned trial Judge appreciated the strength of the evidence upon this point as appears from the instructions given by him and embodied in No. 29 of the specifications of error of law as follows:

The evidence in this case shows without any conflict that if there was any negligence in the construction or use of the "Tommy Moore" strap, that it was the negligence of the foreman of the crew there Gordon, and for that negligence, if there was any, the defendant would be responsible.

This instruction which, it is submitted, was clearly erroneous as to the law applicable, yet nevertheless, shows that the Court's view of the effect of the testimony was similar to that herein presented.

We submit that this particular instruction of the Court, clearly erroneous under the pleadings in this case, as we contend, left the jury no option whatever, but required them to find a verdict in favor of the defendant in error, inasmuch as all the testimony clearly showed that the only negligence was that of Gordon in selecting a defective cable out of which to make the strap, instead of a suitable and safe piece out of the abundance furnished by the plaintiff in error for his use.

The rule is well settled that when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the

construction of appliances for use in work, the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, the duty of exercising reasonable care to construct such appliances is that of the employees, and not of the employer.

In the case of *Leishman vs. Union Iron Works*, 148 Cal. 274, it was the duty of the foreman of the molding department to furnish the molders with certain "plates" to be used in manufacturing moldings for casting piston rings. The defendant furnished for use of such foreman "plates" other than the one selected by the foreman at the time of the injury, and it was the duty of the foreman to select such "plates" as were proper for the job.

The testimony showed that the injury in question might have been caused by the selection by the foreman of a "plate" in a dangerous condition by reason of rust. It was held:

There can be no doubt but that the settled rule is that an employer must provide his employees with safe appliances with which to do the work for which they are engaged; that he must keep such appliances in reasonably safe condition, and that this is a personal obligation which cannot be delegated so as to relieve the employer from liability in not having done so. But there is no positive duty incumbent upon an employer to furnish such appliances to do the work as completed instruments. He may supply sufficient and suitable materials to the employees themselves out of which the appliances with which they are to work are to be constructed and adjusted by them, in which

case the general rule that safe appliances shall be furnished by the employer—that is, that efficient and complete appliances shall be furnished by him—has no application. His obligation to his employees as far as furnishing such appliances is concerned is satisfied when he furnishes suitable materials with which to construct them, and under the terms of the contract of employment, either express or implied, the employees themselves are to do the constructing. In that event the employer is not liable for an injury through a defect in the construction or adjustment of such appliances.

See also *Burns vs. Sennett*, 99 Cal. 363.

Kerrigan vs. Ry. Co., 138 Cal. 511.

In the case of *Callan vs. Bull*, 113 Cal. 593, it is held that

A superintendent employed by the contractor to represent him in the work is his vice-principal or agent as respects the furnishing of suitable appliances which it is the employer's duty to furnish; but where the appliances are to be constructed or adjusted by the servants themselves out of materials furnished by the employer, all of the employees, including the superintendent, are fellow servants, irrespective of rank, as to any defect or negligence in their construction or adjustment, and the employer is not liable for such defect or negligence.

To the same effect see *American Bridge Company vs. Seeds*, 144 Fed. R. 605.

PURPOSE, SCOPE AND EFFECT OF SECTION 1970 OF THE CIVIL CODE AND AMEND- MENTS THERETO.

Prior to the amendment of 1907 to Section 1970 of the Civil Code of the State of California, the provisions of this section were simply declaratory of the

master's common law liability that existed at that time by judicial decisions.

Cosgrove vs. Southern Pacific R. R. Co., 88 Cal. 360-367.

Not only in the State of California, but in practically all of the States, so far as our research has gone, the liability of the master was declared by judicial decisions as existing at common law to the same extent as appears in Sections 1970 and 1971 of the Civil Code, and under the doctrine recognized and approved by an unbroken line of judicial decisions of all the courts of the land, the master was clearly not liable for the negligence of a fellow servant, in the same general business.

This doctrine has been so clearly established that it is unnecessary to cite any authorities at this time.

By the enactment or adoption of Section 1970 of the Civil Code of the State of California as originally adopted there was but carried into statute the previous and then prevailing common law rule as promulgated by the judiciary of this country, that the master is not liable for the negligence of a fellow servant.

So when Section 1970 of the Civil Code was originally enacted, so far as this State is concerned, it was merely declaratory of the common law that prevailed.

Judd vs. Letts, 158 Cal. 363.

In the year 1907, said section was amended to read as it is at the present time.

In England in 1880, and subsequent to that time in a great many States of the Union, laws were passed,

known as the Employer's Liability Acts, and various State Acts having for their foundation the original English Act of 1880, and the construction so far as those acts are concerned has been uniform to the effect that the doctrine of fellow servant was modified by those acts, and that *new causes of action were thereby created, to the extent of the enumerated instances* specified in the respective acts. In these Liability Acts, causes of actions are given to various named persons and classes of persons therein enumerated.

The amendment of 1907 to Section 1970 of the Civil Code of California seems to have been borrowed from the Employer's Liability Act of the State of Mississippi, and more nearly resembles it than any other act we have been able to find, and in interpreting that act the Supreme Court of Mississippi in the case of *Bussie vs. Gulf & S. I. R. Co.*, 31 Southern 213, uses this language:

It was left for the framers of the Constitution of 1890 to accomplish this greatly needed change; and Section 193 of the Constitution which created for the first time in this State, new, wholly-new rights and causes of action never existing before, effected this change. It is indispensable to understand that Section 193 did create the rights and causes of action it provided for (72 Mississippi 16). It provides that as to employees injured by the negligence of fellow servants, of the class described in Sec. 193 there should exist thereafter, as there had never done before, these causes of action.

In *Mobile J. & K. R. Co. vs. Hicks*, 46 Southern 366, the Supreme Court of Mississippi in speaking of the scope and effect of Section 193 of the Constitution of that State held:

Section 193 was intended primarily for the benefit of the injured employee. Rights of actions which were unknown before were created for the benefit of certain employees of railroads.

Again at page 368 of the same case the Court held:

We think, however, that this Court will stand by the theory carefully defined in the Bussie case; that it will continue to treat Section 193 of the Constitution as being the originator of certain causes of action, the employment of which must be developed by legislation formed for that specific purpose; that it did not create these causes of action with the intention that they should be henceforth treated as belonging to the same class with all other causes of action for personal injuries. This Court has in the White and Bussie cases expressly decided that the said section creates "causes" of action, and that these causes of action were wholly unknown before. *It is not held that the said section simply abolishes defenses to actions which could be maintained theretofore. The causes themselves were created.* (Italics ours).

In the case of *White vs. Louisville, N. O. & T. Ry. Co.*, 16 Southern, 248, after reciting the facts of the case the Court uses this language:

The ground of liability is the common law duty of the appellee to provide safe machinery and appliances for its employees. The remedy to enforce this liability in favor of appellant, in the case made in this record, is based properly on Section 663, Code 1892. The negligence alleged is not the negligence of a co-employee, but the negligence of the company itself. The Hunter case, 70 Miss. 471, 12 South. 482, therefore does not apply. The ground of liability on which this case is rested existed before the Constitution of 1890 and is wholly independent of it. That instrument did not take away any existing ground of liability; it added new ones theretofore denied by our laws.

We contend, therefore, that the amendment of 1907 to Section 1970 of the Civil Code of the State of California merely creates new and additional liabilities on the part of the master. Liabilities resting solely on the statute and constituting new causes of action in favor of the servant.

These new liabilities are purely creatures of the statute.

It is to these extended and enlarged liabilities that the Legislature applied and clearly intended to apply the remedy therein provided for cases wherein injury or death results by reason of the enlarged and statutory liabilities of the master for the negligence of the fellow servants in the particular instances enumerated in the amendment.

In considering the Liability Acts the Courts have uniformly abided by the theory that the purpose of such acts was simply to enlarge the liability of the master and extend the rights of the servant, and that those acts when construed, should be interpreted in the light of that purpose and, unless such result was absolutely inevitable, should not be construed as in any way taking from the employees any of the rights and remedies that existed at the time of their passage under the general law.

Plainly the amendment of 1907 to Section 1970 of the Civil Code is an introduction in this State for the first time of any Employer's Liability Act. At the time of its adoption, if an employee suffered injuries under the

same state of facts as alleged in the complaint in this action, an action could have been maintained by him under Section 1970 of the Civil Code as it stood prior to the amendment of 1907.

Unless the unequivocal mandate of the amendment so demands the rights and remedies, arising out of the relation of master and servant, in force and effect at the time of its enactment, should not be held to have been abrogated or wiped from our laws. This is particularly true in view of the evident purpose of the Employer's Liability Act in extending and not restricting the rights of the employee and the consequent and logical conclusion that no construction thereof should receive judicial sanction which would to any extent interfere with or prejudice any of the rights and remedies theretofore existing on behalf of the employee or his survivor unless positively demanded by plain and unambiguous legislative command.

Therefore, as the law stands to day, an action for personal injuries may be predicated upon two distinct bases or theories as warranted by the facts, viz:

1st. Upon the general or common law as to the primary duty of the master to his servants, and which duties he must perform, are to furnish such servants with suitable machinery and appliances with which the services are to be performed; to afford them reasonably safe places in which to perform their labor and to use due care in the selection of fit and competent fellow-employees under Section 1971 of the Civil Code, or under that portion of Section 1970 Civil Code which

makes the employer liable when the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or where he has neglected to use ordinary care in the selection of the culpable employee.

Skelton vs. Pacific L. Co. 140 Cal. 507

Callan vs. Bull 113 Cal. 593.

Donnelly vs. San Francisco Bridge Co. 117 Cal. 417.

2nd. Upon the statutory grounds, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, *or of a person employed by such employer having the right to control or direct the services of such employee injured* as now specified in Section 1970 of the Civil Code.

Our contention is that in order to base or predicate a cause of action on any of the statutory grounds contained in the amendment of 1907 to Section 1970 of the Civil Code, to-wit:

That the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control and direct the services of such employee

it is necessary to allege and set forth in the complaint facts which bring him within the provision of the amendment upon which he relies.

As stated earlier in this brief, the complaint in this action states, and only states a cause of action based

or predicated on the general or common law liability of the master to his servant.

It does not even attempt to state a cause of action based on or predicated on the statutory liability as laid down in Section 1970 of the Civil Code, and especially on that portion of said section wherein it gives to the injured employee a cause of action for “an injury which resulted from *the wrongful act, neglect or default of any agent, or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control and direct the services of such employee injured.*”

It is an elementary principle of law that “*where a party relies for recovery upon a special statute creating a liability where none existed before he must set forth in ordinary and concise language a statement of facts showing his right to recover under the statute.*”

Kelly vs. Northern Pacific R. Co. 88 Pacific Rep. 1009.

Union Pacific R. R. Co. vs. Wyler 158 U. S. 987.

Fountain vs. Southern Pacific R. Co. 54 Cal. 645.

Indianapolis & G. R. T. Co. vs. Foreman 69 N. E. 676.

American Rolling Mill Co. vs. Hullinger 69 N. E. 460-2.

Austin vs. Goodrich 49 N. Y. 266, 31 Cyc. 115, and cases cited.

The case of *Kelly vs. Northern Pacific R. Co.*, above cited, was a case identical in principal with the case at bar.

There the complaint in substance alleged that the defendant company so negligently managed, operated and run its cars as to cause plaintiff to be thrown off and injured.

On the trial the plaintiff sought to prove that he was injured through the carelessness and negligent acts of an engineer in the operation of the engine with which they were working.

The defendant thereupon interposed the following objection:

I object, upon the ground that under the pleadings in this case no proof can be offered of any alleged negligent actions of the engineer in operating the engine attached to this string of cars, for the reasons, first, that the pleadings here alleged negligence, not on the part of any employee of the company defendant, but only negligence on the part of the defendant company itself causing the injury to the plaintiff; second, for the reason that to show negligence on the part of the engineer would be, at common law, to defeat the right of recovery, because it would be barred as being the negligence of a fellow servant; and this complaint will not warrant a recovery upon the statutory cause of action afforded by the act of 1905, the so-called Fellow-Servant Act, for the reason that it does not in terms aver an essential element of said statutory right, viz: that the negligence of some employees of the defendant engaged in the operation of the railway; also, in connection with the statement of counsel that negligence of the engineer was proposed to be proved, you cannot show fault of the engineer under either act of 1905, or the so-called Fellow-Servant Act of 1903, because each of these acts gives now an exceptional statutory right, and that right is dependent upon the neglect being that of some other servant or employee under

the act of 1905, or that of the engineer and other enumerated persons under the act of 1903, and to recover under the statute, there must be an averment that the neglect relied upon and proposed to be proved was that of another employee, if under the act of 1905, or the engineer if under the act of 1903.

The trial Court sustained the objection.

In affirming the ruling of the trial Court, the Supreme Court of Montana stated:

When tested by the rules of pleading, we think it is evident that this action is not predicated upon any of the provisions of the employers' liability acts of this State; for the rule is well settled that, when a party in his pleading seeks to avail himself of the benefits of a statute, he is required by the averments thereof to bring himself fully within the provisions of the statute upon which he relies. *Indianapolis, etc., Co. vs. Foreman* 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185. A complainant who seeks to base an action on any of the provisions of the employers' liability act must by positive and direct averment of facts show that the action falls within the particular provision on which he relies.

In order to settle the rule in this State, we decide that, when a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under the statute.

The case of *Union Pacific R. Co. vs. Wyler* cited above was also a similar case and in deciding that case Mr. Justice White, who delivered the opinion, states:

If, however, he commences his action, and relies upon his common law right, we do not think he can amend his common law declaration by setting

out the statute, and relying upon that for his right to sue and for his recovery. In this case the original declaration was founded upon the common law right. Nothing was even intimated therein to the effect that he relied upon the statute. According to the decision in *Exposition Cotton Mills vs. Western & A. R. Co.* and cases cited therein, made this term, 83 Ga. 441, this amendment would have added a new and distinct cause of action.

It required the pleading of the statute to give them any vitality at all. As we have seen, that statute is not mentioned or intimated in the original declaration, and hence to have allowed the amendment offered, would have been allowing the introduction of a new cause of action.

Citing 83 Ga. 659; 69 Ga. 47; 108 Ill. 91; 85 N. C. 156; 59 Tex. 615; 43 N. J. L. 430; 11 Kas. 176 and 107, Ill. 340.

Quoting further from the same opinion:

The question then is, does the second amended petition state a new cause of action, so as to amount to a departure? In examining this question we must bear in mind what is the common and general law governing the relation of master and servant which prevails also in Missouri. By this law a servant cannot recover from a common master for injuries suffered from the negligence of a fellow servant.

However, where the master knowingly employs an incompetent servant, or when he keeps a servant in his employ after he has acquired knowledge of his incompetency, he is liable for damages caused to a fellow servant resulting from such incompetency. The statute of the state of Kansas which makes employers operating a railroad liable to one servant for the neglect of another without regard to the rule of incompetency as above stated, is

clearly in derogation of the general law, which, as we have said, prevails in Missouri where the action was originally brought.

The first petition manifestly proceeded exclusively on that part of the general rule which holds the master liable who with knowledge employs or retains an incompetent servant. It made no reference to the Kansas statute, and did not directly aver negligence on the part of the fellow servant, except in so far as this might be inferred from the averment of his incompetency * * *

It seems impossible to conceive of language which could more directly rest the cause of action on the general or common law of master and servant * * *

A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not per se a charge of negligence on the part of the fellow servant, then the averment of negligence, apart from the incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law.

In the case of *Indianapolis & G. R. T. Co. vs. Foreman* 69 N. E. 676, it is stated:

It is a well settled rule that when a party seeks the benefit of a statute he must by averment and proof bring himself within its provisions.

In *American Rolling Mill Co. vs. Hullinger* 69 N. E. 460, at page 462, the Court states:

As to the sufficiency under the employers' liability act the general rule is that, if a person seeks to maintain an action under a statute, he must state specially every fact requisite to enable the Court to judge whether he has a cause of action under the statute.

In *Austin vs. Goodrich* 49 N. Y. 266, it is stated:

Where one seeks to maintain an action under a statute it is a sound and well settled rule of pleading that he must state specially every fact requisite to enable the Court to judge whether he has a cause of action arising under the statute.

In *Fountain vs. Southern Pacific R. Co.*, 54 Cal. 645, it is held:

Where the non-performance of a duty imposed by statute is relied upon as the gravamen of the action, the conditions in view of which the duty is to be performed, must be averred.

In view of the foregoing and numerous other authorities which we deem unnecessary to cite, we submit that the cause of action alleged in the amended complaint in this case is one resting entirely and solely on the common law liability of the master to the servant, and in no manner nor by any construction can be claimed to be based upon that portion of Section 1970 included in the amendment of 1907 whereby the employer is made liable for an injury *when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured.*

Nowhere in the amended complaint is there any allegation or reference to the injury being caused by the wrongful act, neglect or default of any agent or officer of the defendant, superior to the employee injured, or of any person employed by such employer having the right to control and direct the services of the employee injured.

In the case of *Brown vs. Central Pacific Railroad Co.* 68 Cal. 173, it is stated:

In our opinion, the question of the responsibility of a common employer for the acts or negligence of another person employed in the same general business (Sec. 1970 Civil Code) is not here presented. The case as presented in the complaint is of alleged acts and omissions on the part of the defendant itself, as employer (Sec. 1969 Civil Code). Whether the proofs will sustain the allegations is not now for consideration. As against positive allegations that the acts and omissions complained of were by the defendant we cannot presume that they were those of a fellow employee of the deceased.

Therefore the defendant had the right to assume and did assume that plaintiff's cause of action was based on the common law liability of the employer and not on any statutory liability for the reason that no facts were alleged which would bring his case within the statute.

It was contended by the attorneys for defendant in error in the case at bar that a corporation can only act through its officers, agents and servants, and therefore when it is said that defendant negligently and carelessly

made and constructed the "Tommy Moore strap," the inference is natural that the person or persons making said strap was another employee of defendant.

The case of *Kelly vs. Northern Pacific Ry. Co.*, 88 Pacific Reporter 1011, above cited, clearly answers this contention wherein it is stated:

To adopt this reasoning would be to lose sight of the distinction between the acts of a corporation, which though performed by an agent, are yet in law primarily the acts of the principal, and those other acts of its agents which, though the master may be liable for them, are yet primarily the acts of the servant, and for which the master is only liable on the principle of respondent superior. The recovery in the one case rests upon a breach of primary duty on the part of the employer, and the other upon the principle that the master is liable for the negligent acts of those he employs in the prosecution of his business.

Counsel for plaintiff urged at the trial that because the Supreme Court of California had in one or two cases observed in effect that the main purpose of the amendment of 1907 to 1970 Civil Code was to modify the defense based on the "fellow servant rule, that therefore there was no other purpose in its enactment. From this they argue that such amendment did not create a new cause of action.

That one of the purposes of the amendment was to modify the "fellow servant" defense in certain cases may be freely conceded; and when the Supreme Court used the language relied upon, it was speaking of conditions involving the question of defense and its language was perfectly appropriate to the issues therein involved.

Nevertheless, that amendment also did create an absolutely new right of action where none existed before. If counsel denies this, let them explain just under what statute or law their client Davis could have a right of action against plaintiff in error for injuries due to the negligence of his fellow servant Gordon as disclosed by the evidence, in the absence of the amendment of 1907 to Section 1970, Civil Code. How would they get past the very language of Section 1970 Civil Code as it existed before that amendment, i. e., "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the negligence of another person employed by the same employer in the same general business."

Counsel also urged that the case of *McLain vs. Dahlstrom Co.*, reported in California Appellate Decisions No. 736, is an authority in favor of their contentions. In that case the complaint averred that the injury was occasioned by defendant's negligent acts performed through a foreman. The Court held that the designation of the agent through whose acts the negligence arose did not detract from the force of the charge that defendant's negligence occasioned the injury. Counsel must have failed to observe that in that case the negligence alleged and proven was in the performance of the primary duty the defendant owed in supplying reasonably safe appliances; and, of course, this duty could not be delegated. Therefore, in alleging that an agent of defendant performed the negligent act, the plaintiff was simply giving defendant more information than the law required.

That case had no bearing upon a cause of action based on the amendment of 1907 to Section 1970 Civil Code.

In view of the errors of the trial Court hereinbefore referred to, we respectfully submit that the judgment should be reversed.

MAHAN & MAHAN,

KENNETH NEWETT, JR.,

LILIENTHAL, MCKINSTRY & RAYMOND,

Attorneys for Plaintiff in Error.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH JUDICIAL
CIRCUIT.

METROPOLITAN REDWOOD LUMBER
COMPANY

(a corporation),

Plaintiff in Error.
(Defendant below)

vs.

HUGH DAVIS

Defendant in Error.
(Plaintiff below.)

IN ERROR TO THE CIRCUIT COURT OF THE
UNITED STATES FOR THE NINTH
DISTRICT OF CALIFORNIA.

STATEMENT OF THE CASE.

The defendant in error prosecutes this action to recover damages for personal injuries received while at work, as a laborer for the plaintiff in error, in the logging woods of Humboldt County.

It is alleged in the complaint and admitted in the pleadings that on or about the 15th day of August, 1910, and for a long time prior thereto, the plaintiff in error con-

ducted logging operations on lands near Howe creek in the County of Humboldt, State of California; that said logging operations consisted in cutting down or felling redwood and fir trees, converting the same into saw logs and hauling or dragging the same by means of a wire cable attached to a steam engine, known as a Compound Yarder Donkey, to a landing, from which said logs were transported by a railroad to a saw mill to be manufactured into lumber. That said cable was about one and one-quarter inches in diameter and used for the purpose of hauling one saw log at a time over and along the road or drag-way to the landing, a distance of about four hundred yards. That said road or drag-way conformed to the lay of the land and has two straight courses, to-wit: the road or drag-way ran in a straight course from the landing, a distance of about three hundred feet and then turned at right angles pursuing the last course to the point where the logs were hauled from. That at the point or angle on the drag-way where the two straight courses meet, there was placed a "Tommy Moore" fastened to a large stump by means of a wire rope called a "Tommy Moore Strap"; that the "Tommy Moore" consisted of a large iron or steel block containing a swivel and weighing about six hundred pounds. That the "Tommy Moore" was so placed for the purpose of keeping the cable in position and was used for that purpose. That the cable passed through the "Tommy Moore" around the swivel therein contained and was thereby held in position. That the "Tommy Moore Strap" consisted of a wire rope about one inch in diameter and about thirty feet in length, the two ends of the

wire rope being fastened to the "Tommy Moore" and the loop of the wire rope was then placed over and around a redwood stump located on the side of the drag-way opposite the point where the "Tommy Moore" was placed. That on or about the month of May, 1910, the defendant in error was employed by the plaintiff in error as a "chasser" on said road or drag-way, and that his duties under such employment were to take charge of the "Tommy Moore," to tend to the cable and signal to the engineer who had charge of the Compound Yarder Donkey, when to stop and when to start the engine, while the saw log was being hauled or dragged over and along the drag-way to the landing.

It is alleged in the Complaint and the evidence shows that in the performance of the duties of his employment, the defendant in error was compelled to stand near the stump, around which the "Tommy Moore Strap" was fastened, in order to give the signals to his engineer. That in order to give the signals it was necessary for the defendant in error to stand in a position in plain sight of the engineer and at a point near the drag-way where he could have a plain view of the courses of the road or drag-way. The testimony is conclusive on this point and is as follows:

(Defendant in Error) "If I stood any further than twelve feet I could not see the log, I might as well not be there at all. I could see the engineer at the same time. There was no other place where I could have stood and have seen the log and the engineer and performed my duties than the place where I did stand." (Tr. p. 57)

"The foreman told me not to take this position.

Now he told me after I had gone down the road and at that time he was attending to a foul line when he told me that I had no business there, that my business was around this side of the stump. He told me that I was to be down here to give the signal, the engineer could not see me when I was up above. He said why aren't you down here. He told me my place was here. He said down here you belong. That was because I had to give the signal to the engineer and watch the log at the same time * * * He said I want you down here. I want you by the Tommy Moore. You can't give the signal up there. * * * Mr. Spain did not warn me against standing too close to that stump. He never warned me about standing too close to that stump." (Tr. pp. 65-6)

"I had to be in that position to do my work. I took it because Spain told me to and because I had to be there any way, for both reasons. If Spain had not told me to I would have taken that position any way. I took that position before Spain told me at all." (Tr. p. 68.)

(Witness Laird) "This road came down the hill at right angles on the day of the accident, as compared with the landing. In other words, it was right straight up the hill from the stump. I do not think a person could act in the capacity the plaintiff was and stand in any other place, except at the stump. There was no other place where he could stand and see up the road, so as to see the log and at the same time see the engineer." (Tr. p. 75.)

It is alleged in the Complaint and proved without contradiction that the plaintiff in error carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore Strap" and that on the 15th day of August, 1910, said strap was in an unsafe and defective condition; that it was unsafe, defective and dangerous; that it was made out of an old, badly

worn, weak and rusty cable, and did not possess sufficient tensile strength to withstand the strain that was placed upon it. That on said day and while the strap was in said unsafe, dangerous and defective condition and while the defendant in error was engaged in the performance of the duties of his employment, the strap broke, by reason of the unsafe, dangerous and defective condition, and caused the injury complained of. The uncontradicted proof shows that the defendant in error suffered terrible and permanent injuries, being confined in a hospital for over one year and one-half, and left a helpless cripple for life.

ARGUMENT.

The Injury was caused by the breaking of a defective Permanent Appliance.

The "Tommy Moore Strap" was one of the permanent appliances or instrumentalities used in hauling or dragging all saw-logs situated tributary to the said drag-way. It was as much a permanent appliance or instrumentality, as the "Tommy Moore," the main cable, the donkey engine or the mill that manufactured the logs into lumber.

The following positive, unqualified testimony of Mr. Spain, the foreman of plaintiff in error, and the only witness produced on its behalf, establishes this important fact:

"When this Tommy Moore was placed there in position, and held in position, by this Tommy Moore Strap, it was placed there for the purpose of remain-

ing there as long as they hauled down that way to the landing. It was a permanent contrivance to remain there as long as they used the road hauling logs down there to the landing, and the 'Tommy Moore' did remain there during the time they used that landing and were hauling logs down by it." (Tr. pp. 97-8.)

Before logs are hauled to the landing, all the instrumentalities necessary to carry on the transportation are made and placed in position. First, the road or drag-way is made, the landing prepared, the donkey-engine placed in position on the landing, and the cable, some 1200 feet in length in this case, placed in position along the drag-way and maintained in position by the "Tommy Moore" and the "Tommy Moore Strap." It takes many days to construct and arrange these various appliances and instrumentalities before the real work of dragging the large saw-logs commences. All these appliances remain permanently in position until all the logs tributary to the drag-way have been hauled to the landing.

In the case at bar, all these appliances remained in their permanent place for many months and were intended so to remain until all the logs were transported from that particular territory. In addition to the direct admissions of plaintiff in error, all the surrounding circumstances of the work show that the machinery, appliances and instrumentalities used were permanently fixed before the defendant in error assumed the duties of his employment. The cable, the "Tommy Moore," and the "Tommy Moore Strap" were just as permanent instrumentalities as the railroad that hauled the logs from the

landing. In order to transport these large redwood logs from the forest, a logging railroad is first constructed along some convenient gulch, then cable roads are made up the ravines. These cable carriers are as complete in themselves as the railroad. The railroad is used until all the logs in the territory tributary to it are transported, the cable carrier is used until all the logs tributary to it are hauled to the railroad. Some of these cable carriers are used for years. The one in question was used for a season. Spain testified as follows:

"I was the foreman of the Metropolitan Redwood Lumber Company on August 15th, 1910, at the time of this injury * * * Mr. Davis was a member of Red Gordon's crew * * * I remember the occasion of them going over to this particular place to work. I instructed them to go over there. I instructed Red Gordon. I told him to go ahead and make a road and pull logs. That means go over there and make his donkey site and get his road ready, there was grading to do upon the road there, get his strap ready and hang out his blocks and this "Tommy Moore," stretch his line." (Tr. pp. 88-9.)

The cable carrier is a complete instrumentality in itself and permanent in its use. There is no element of temporary character connected with it. It is not a temporary device to be constructed by the servants for their convenience in carrying on the work. It is a powerful machine or instrumentality made to withstand a pulling strength of from sixty to eighty horse power and used for the purpose of dragging along the drag-way logs six to eight feet in diameter and weighing many tons.

Sometime after this cable carrier with all its parts

and instrumentalities was constructed and placed in position to perform the work for which it was constructed, the defendant in error was employed as a "chaser" or tender of the Tommy Moore and entered upon the performance of his duties. He had nothing to do with the construction of any part of the cable carrier and was not present when this work was being done. He was not a member of the crew when the "Tommy Moore Strap" was made. His testimony stands admitted:

(Defendant in Error) "I saw the strap the first day I was there. I saw the strap every day and every time a log came along, but I did not take any notice. I did not look at it to see if it was defective. I did not know whether that strap was defective or not *
 * I did not see the strap made. * *
 * I do not know what they made it out of. I don't know where they got the cable to make it. * *
 * I saw it after it was made. (Tr. pp. 64-5.)

"I saw the strap every day, the "Tommy Moore" strap was present in front of my own eyes, and the strap that caused the injury was present in front of my eyes every day. It was there but I did not pay any particular attention to it. I didn't take any particular notice of it, I could have examined it if I wanted to. I thought there was no need of it. I had no experience in lines, I could have examined it if I wanted to; there was nothing to keep me from examining the "Tommy Moore" strap used there. I didn't know it needed examining; in the first place I did not know anything about it." (Tr. p. 68.)

"I never was there when this strap was made at all, I had nothing to do with the handling of it at all. I never put the Tommy Moore strap upon the stump. I never fixed the Tommy Moore strap at all. I had nothing to do with the placing of the Tommy Moore strap and nothing to do with this particular strap that broke." (Tr. p. 70.)

That the plaintiff in error carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore Strap" and that said strap was in an unsafe and defective condition, when the injury was suffered, is proved beyond debate. In fact, it is admitted by the record.

The following is testimony of witnesses Laird, Carey and Brunnious on behalf of defendant in error:

(Witness Laird) "I could not say exactly how long before the accident that strap was made; it had not had a great deal of use; it had been made quite awhile, but it had not been used much. It was approximately two or three weeks. Two other fellows and myself made that strap. They were Mike Carey and a man by the name—I don't know exactly what his name was but we called him Romeo. The hook tender instructed us to make that strap * * his name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of. * * He pointed it out to us. He told us to cut enough out of it to make a strap for the Tommy Moore and showed us the cable. I and these other gentlemen cut the strap off, cut off a piece rather from this cable and we made the strap." (Tr. pp. 71-2.)

"It was a very poor piece of line in my estimation. * * * It was worn, you could tell by looking at it even, and without handling the line any at all, you could tell it was worn; in the first place it was small, I should not think that it was big enough to be used for a strap for a Tommy Moore from what I know about them. I should judge it was an inch and an eighth line in diameter, or it had been. The strands were worn. The strands would break off, when we would go to push them in through the wire, they would break; the wire strands would break and fly back when we pulled the line through. I went on and helped to

splice the line, with these other two gentlemen. It showed indications of being worn out. I had much difficulty in making that splice. After we had made it we took the strap to the stump and put it on the "Tommy Moore" and put it around the stump and connected it on to the "Tommy Moore." (Tr. pp. 72-3.)

(Witness Michael Carey) "The chain tender told me to make that strap. His name was Gordon. The hook tender told me where to get the cable to make the strap. He told us to make a strap and cut that out, and showed us what piece to take. He marked off the particular piece of the cable that was to be cut. * * * The cable was in a poor condition. The cable was worn out. We had trouble splicing it. We could not pull the strands through, it was all chipped and broken off, on account of the worn condition. It was rusted out." (Tr. pp. 78-9.)

(Witness Tom Brunnus) "The engine figured about eighty horse power. The gearings increased the horse power. It was what they called a compound gear machine. Now the horse power of that engine is thirty-three thousand pounds, lifted a foot a minute. The cylinder capacity of the engine would figure out eighty horse power and it was sixteen to one. I never stopped to figure out exactly what strain the engine could put upon the cable. In plain English, it was a very powerful engine. It would break one of those cables at times, and according to the wire companies that manufacture that kind of cable, they claim will stand about seventy-two tons strain. The comparative strain on the cable fastening the "Tommy Moore" to that stump on the day of the accident, taking into consideration the right angled haul or pull, is considered twice the purchase on one single wire of that strap as upon the main line. But of course the strap being doubled, we have two parts, therefore on one part of the strap there would be the same strain as upon the main line. In other words if the strap was of the same size and the same tensile strength as the main line,

one way doubled around that stump would offset the power of the main line." (Tr. pp. 85-7.)

The facts of this case as disclosed by the record plainly show that the injury complained of was caused by the carelessness and negligence of the plaintiff in error in not providing and maintaining a safe and suitable "Tommy Moore Strap." This strap was a permanent appliance or instrumentality and the law imposes a primary duty on the master to exercise ordinary care in providing and maintaining such an appliance.

The trial judge, Hon. J. J. DeHaven, who recently returned unsullied to his Country the ermine cloak of the judiciary and passed to a higher world of merit, clearly stated the law governing this cause:

"I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employe is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they have been so furnished and provided, and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care."

(Instruction No. 5, Tr. p. 102.)

"A person who enters the service of another assumes all the ordinary risk incident to the employment in which he is engaged. While this is the law upon this subject, it is qualified by the rule that the employer is charged in law with the duty of not subjecting his employee to risks by his own negligence."

(Instruction No. 12, p. 104.)

"Under this rule the employer is required to use ordinary care, not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence directly or proximately causes injury to the employee, he is responsible to the person injured thereby, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which the employee was engaged, were unsafe and unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continue in the use thereof."

(Instruction No. 13, Tr. p. 105.)

The learned Judge further instructed the jury in substance, that plaintiff in error was responsible for any negligence of Gordon, the hook tender, in the construction or use of the "Tommy Moore Strap."

The Plaintiff in Error Violated a Primary Duty.

It is the primary duty of an employer to furnish and maintain safe and suitable machinery, appliances and instrumentalities for his employes to work with, and this duty cannot be delegated to fellow-servants or co-

employees. Their acts are the acts of the employer, their negligence is his negligence. The Supreme Court of the State of California has, in a clear and forceful manner, stated the law on this subject.

"The acts which the master as such, is bound to perform for the safety and protection of his employees cannot be delegated, so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or misfeasance is that of a superior officer, agent or servant, or of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees."

Sanborne vs. Madera Flume Co., 70 Cal.,
page 265-6.

It was a primary duty of the plaintiff in error to supply and maintain a safe and suitable "Tommy Moore Strap," and having failed to do so, is liable, regardless of whose carelessness or negligence caused the injury.

The only question involved in cases of this character is, was the appliance or instrumentality a permanent appliance or instrumentality that the law imposes a pri-

mary duty on the master to furnish the servant? An affirmative answer completely disposes of any and all questions concerning the responsibility of the master for acts of fellow servants under the fellow servant rule.

In the case at bar, not only does the testimony introduced by the defendant in error prove that the "Tommy Moore Strap" was a permanent appliance or instrumentality, that the law places a primary duty on the master to furnish and maintain in a safe and suitable condition; but in addition the direct proof and admissions of plaintiff in error confirm the conclusion. As stated above, the foreman Spain, the only witness produced on behalf of plaintiff in error, testified, "When this Tommy Moore was placed there in position and held in position by this Tommy Moore Strap, it was placed there for the purpose of remaining there so long as they were hauled down that way to the landing. *It was a permanent contrivance to remain there as long as they used the road hauling logs down there to the land, etc.*" (Tr. p. 97-8.)

It will be noted that there is no controversy between the learned counsel for plaintiff in error and ourselves on the question whether or not the Tommy Moore Strap was a permanent appliance. Not only do they agree with us on that fact, but also on the trial the record shows that they assisted us in proving the same. They admit that the strap was a permanent instrumentality; they admit that it was negligently made and maintained; they admit that defendant in error was frightfully injured and left a helpless cripple for life; they admit (by infer-

ence) that plaintiff in error is responsible under the law for the injury, but plead in avoidance of the liability that defendant in error should have commenced some other kind of action, based on some fanciful theory of legal ledgerdeman, evolved from the fruitful minds of the learned counsel.

Plaintiff in error in its brief does not contend that the Tommy Moore Strap was a temporary device and therefore admits by silence that said strap was a permanent appliance as alleged in the complaint and shown by the testimony. Therefore we conclude that it is an admitted fact in the case that the strap was a permanent appliance or instrumentality and that under the law of the forum, a primary duty rested upon the plaintiff in error to furnish and maintain it in a safe and suitable condition. However, for the purpose of calling the attention of the Court to the rule laid down by the Supreme Court of California on the question of what is and what is not a permanent appliance or instrumentality, we beg to refer to certain decisions here enumerated. In substance it is held that where temporary structures, such as scaffolding, is erected by the employees themselves on which to work while performing their duties involved in the erection of and construction of a building, a primary duty is not imposed upon the master, but where the structure or device constructed becomes a permanent appliance, it is the duty of the master to make such appliance safe and suitable even though it was a temporary structure in the first instance. This rule is laid down clearly in the case of *Hanley vs. California, etc., Co.*, 127 Cal., 232:

"Where a permanent tunnel is driven into a mountain to open up veins of mineral or pierces a mountain to furnish a permanent bed for a railroad, we think that as fast as it is completed, the finished tunnel becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted. Some of the great railroad tunnels of this century—for example the Hoosac and Mont Cenis Tunnels—required years for their completion from end to end. It would be most unreasonable to hold that the laborer employed upon the unfinished portion of one of these tunnels must take a fellow servant's risk in passing through miles of completed work to get to his place of employment; nor can we see that the case would be different where he himself helped to complete the finished portion."

In a recent case decided January, 1912, the Supreme Court of California upheld to the letter the doctrine relied upon by defendant in error, in the following language:

"Plaintiff's son and another mason built the faulty piers that finally collapsed under the weight of the wall constructed upon the I-beam which rested upon said piers. It is undisputed that plaintiff had nothing to do with the actual construction of these piers. He also testified that he was unaware of the method used in building them. Was plaintiff under such evidence, which the jury had a right to accept, in a position to deny that he was injured by the carelessness of a fellow servant? We must answer this question affirmatively. There was abundant testimony showing that the piers were mere tapering circular chimneys of half bricks, filled in with mortar and "sprawls" or fragments of brick. So constructed they were totally inadequate to carry the weight of the wall which was to be built above the I-beam. George Adele, one of the masons, testified that this method

of construction was followed by reason of the express direction of Connor, who promised a dollar to the man who would build the best looking pier. Wolf, one of the carpenters employed on the building, corroborated Adele in this statement. Connor admitted that he offered a dollar to the man who should construct the best pier and that after the north piers were built he gave each of the workmen a dollar. He denied giving any direction for the building of the piers in the manner described by Adele, but upon the conflict of evidence the jurors might well conclude that Connor ordered the men to construct the piers in a manner to leave them inadequate for the weight which was to be placed upon them, and that after they were so built his attention was particularly directed to them by reason of his promised reward to the builder of the most sightly column. According to the testimony of the plaintiff, Connor ordered him to proceed with the building of the wall after the I-beam had been placed on top of the north piers. Such a state of facts would not support the "fellow servant" doctrine. The place upon the wall where plaintiff was working at the time of the accident was unsafe and the negligence arising by reason of furnishing such a perilous place for the workman is chargeable directly to the master, and this is a rule even when the master has not, as here, actual knowledge of the danger. The piers, topped by the I-beam, constituted a means or appliance furnished for the prosecution of further work. In other words, this case is clearly within the doctrine of those which hold that a tunnel as fast as it is completed becomes an appliance furnished by the master by which the remaining work is to be prosecuted. (*Hanley v. California Bridge Co.*, 127 Cal., 237; (47 L. R. A. 597, 59 Pac., 577) *McRae v. Ericksen*, 1 Cal. App., 236 82 Pac., 210). Essentially the same rule is also expressed in *Mullin v. California Horseshoe Co.*, 105 Cal., 83 (38 Pac., 535), and *Gelasso v. Natl. S. S. Co.*, 27 App. Div., 169 (50 N. Y. Supp., 417).

"The jury was also justified in finding plaintiff guilty of no negligence in failing to observe the faulty

condition of the piers. If he was, as he testified, actually ignorant of existing conditions he was under no obligation to investigate. *Starr v. Kreuzberger*, 129 Cal., 124 (79 Am. St. Rep., 92, 61 Pac., 787), *Silveria v. Iverson*, 128 Cal., 187 (60 Pac. 687); *Oolan v. Sierra Railway Co.*, 135 Cal., 439 (67 Pac., 686)."

Majors v. Connor, 162 Cal., 134, 135.

In the case last cited the faulty pier that caused the injury was constructed by co-employees of the plaintiff, but as it was a permanent structure, when completed it became an appliance that the law placed a primary duty upon the master to furnish and maintain in a safe and suitable condition. In that case the plaintiff had nothing to do with the making or construction of the pier.

So, in the case at bar, the Tommy Moore Strap was a permanent appliance or instrumentality made, constructed and used for the purpose of carrying on logging operations. It was not a temporary device or structure, but on the contrary a permanent appliance absolutely essential and necessary in order to carry on logging operations and in order for defendant in error to perform the duties of his employment. Without it, the real work, for which the strap was made, could not be prosecuted. The defendant in error had nothing to do with the making of the strap. He was employed after the entire cable system had been constructed. He assumed the duties of his employment when the real work of hauling logs commenced (Tr. pp. 65 and 70). Under this state of uncontradicted facts, there can be no serious

debate on the question. Is the master (the plaintiff in error) primarily liable for injuries caused defendant in error, by reason of furnishing and maintaining an unsafe and dangerous strap? The courts are unanimous in holding the master primarily liable under such a state of facts. If the rule were otherwise, what protection would the average employe have? The average laborer is not a skilled mechanic having scientific knowledge and experience sufficient to protect him from working with or near dangerous and defective appliances. But on the contrary must rely upon the master's judgment in these matters. He goes to work where he is told and works with the appliances furnished him. In the natural order of human affairs, he is entitled to presume that safety is assured at least to an ordinary degree. In other words that the master has exercised ordinary care in surrounding the laborer with the instrumentalities to be used by him in the performance of the duties of his employment. The rigid enforcement of this reasonably humane rule of action is imperative under our civilization. The gigantic dangerous machinery, appliances and instrumentalities used in the commercial world of to-day are fruitful sources of misery and suffering. Our hospitals are crowded with maimed and crippled human beings by reason of the carelessness and negligence of employers in failing to furnish safe and suitable machinery and appliances, that the law demands. Whenever a servant is injured through unsafe appliances, the master invariably contends that the injury complained of was caused by the negligence of a fellow servant. And so in this case, learned counsel endeavor to urge the

fellow servant rule. We contend that the fellow servant doctrine is not involved in the case at bar.

**An Employer Cannot Delegate the Performance of a
Primary Duty so as to Avoid Responsibility
for Its Improper Performance.**

Where the master owes a duty to his employee, he cannot escape responsibility for its proper performance by delegating its performance to another servant, as the latter in such a case becomes a vice-principal, representing the employer.

This principle is forcefully enunciated by the District Court of Appeals, Third Appellate District, California, in the Case of Ryan vs. Oakland Gas Co. In that case the plaintiff was employed by defendant in digging a trench for the purpose of laying pipes therein. A portion of the trench was properly braced, but the portion where the plaintiff was injured by reason of the walls caving in, was not braced. A man by the name of Welling was foreman of the crew and directed the work. It was no part of plaintiff's work to do the bracing. In the language of the Court:

"Dillon was specially employed to do this (the bracing) under the direction of either the superintendent or, in his absence, the foreman, and their relation to the work was such as not only gave them authority to determine whether cribbing should or should not be used as their judgment might dictate, but devolved this duty upon them. Nor can we admit the soundness of defendant's argument that Kirk and Welling were fellow servants with plaintiff, thus

giving effect to the rule in such cases and relieving the defendant from liability. 'That the place in which plaintiff was working was dangerous is not seriously disputed; that he had no warning of the danger, except such as his own judgment would suggest to him, is not questioned; that the superintendent knew of the danger is manifest from the fact that he caused the trench to be braced until Grove street was reached; and it was by his direction that the ditch along Grove street was not cribbed. Plaintiff had nothing to do with this part of the work except as directed by the superintendent or foreman; his work was with the pick and the shovel and he had a right to assume that the superintendent was guarding his safety in the place where he was working so far as this particular work of cribbing or bracing was concerned. We entertain no doubt from the facts disclosed in this that Kirk certainly, and we think also, Welling, was the agent of defendant, or its vice-principal. What was said in *O'Connell v. United Railroads*, 14 Cal. App. Dec., 656, 658, 124 Pac. 1033, 1030, is equally applicable here: 'It may be said to be true that, in a general sense, or generally speaking, the motorman and conductor of an electric work-car are fellow servants, but the books are full of cases showing where one fellow servant, in the discharge of a particular duty for his employer, may become, by reason of the peculiar nature of such duty, the master's agent so as to bind the latter for any damage resulting from its negligent execution. The rule is that where the master owes a duty to his employee he cannot escape responsibility for its proper performance, or liability for an injury to one servant occasioned by a failure to perform such duty, by delegating its performance to another servant. (*Tedford v. Los Angeles Elec. Co.*, 134 Cal., 79).' In the *Tedford* case the Court said: 'The fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer—sometimes called a vice-principal. In such case neg-

ligence of the servant is the negligence of the principal, for which the latter must answer.' ”

California Appellate Decisions, Vol. 16, No. 787, page 105. Date of decision January 13th, 1913.

Gordon Was a Vice Principal.

Under the authorities Gordon was a vice principal. He had charge of a crew. Mr. Spain, witness for plaintiff in error, testified that Davis, plaintiff in error, Carey, Breunius, Laird, and Texas Jack were members of said Gordon's crew (Tr. p. 88.). Gordon was boss of the crew (Tr. pp. 76-7.). “Gordon was foreman of the crew and he had full charge.” Witness Carey (Tr. p. 86.). “A man by the name of Gordon had charge of that crew there,” witness Breunius (Tr. p. 84.). He had full charge of the preparation of the place where plaintiff was put to work and had full charge of the installation of the appliances and machinery by means of which the work was done. Plaintiff in error fully established this by Spain, who testified: “I instructed Red Gordon. I told him to go ahead and make a road and pull logs. That means go over there and *make his donkey site* and *get his road ready*; there *was grading to do* upon the road there, *get his strap ready* and *hang out his blocks* and *this Tommy Moore* and *stretch his line*.” (Tr. p. 88.) This constituted Gordon a vice principal.

Our California Supreme Court sustained this view in *Brown v. Sennet*, 68 Cal., 229, which held:

“The defendants abdicated the control and man-

agement of the entire work to the foreman, and gave him *full discretion* to control and supervise it. 'I was,' testified the foreman, 'foreman of the job, * * and superintendent for them.' Under that delegated power the foreman was therefore in the performance of the 'job' in the place of the master."

In *Nixon v. Selby Smelting Co.*, 102 Cal., 463, the same court held: (*italics ours*)

"But in so far as Helm was *authorized* and employed to *prepare the places* in which other servants were to work, or to *furnish the machinery or appliances* with which they were to work, he represented the corporate defendant, and his negligence in the performance of these services was the negligence of the defendant, for the injurious consequences of which to other servants, without their fault, it is responsible to the same extent it would have been if such *places, machinery, and appliances had been prepared and furnished* through the *immediate agency of Mr. Roff, the superintendent, or by Mr. Bill, the special superintendent of the silver room.*"

In *Higgins v. Williams*, 114 Cal., 182, the same doctrine was approved and affirmed, the Court holding:

"It already appears that the *machine was set up and put to work under the direction* and superintendence of Mr. Wilson, who was foreman and manager for the defendants. It was defective and unsafe because no key was put in the pin to hold it in place, and hence the accident. *Wilson knew of this defect, or should have known of it, and his knowledge was the knowledge of defendants.* In performing his duty he acted not as a fellow servant with plaintiff, but as the representative or agent of defendant and for his negligence they are responsible."

The selection of the strap devolved upon Gordon, the foreman, and the crew had nothing to do with its selection. Witness Laird: "Gordon pointed out the cable to us. He showed us the cable to make the strap of." (Tr. p. 72.) Witness Spain for plaintiff in error: "The hook-tender, Gordon, had charge of the selection of the rope that was used for any purpose by the crew." (Tr. p. 90.) "Red Gordon had the selection of any rope or cabel that was used on any of these operations." (Tr. p. 91-2.)

The crew under Gordon did not have the right to select the "*Tommy Moore*" strap and the principle contended by plaintiff in error concerning construction by employees of appliances out of materials furnished therefor does not apply. The crew under Gordon could exercise no choice whatever as to what material should be used. They had no voice or discretion whatsoever in the matter. They could only make the strap out of the material that Gordon directed them to take. Counsel has overlooked the distinction between a case where the employees generally have the right of selection and a case where the selection is left to the foreman alone without giving the employees under him any choice as to what materials or appliances should be used. This distinction is clearly pointed out in *Wall v. Marshutz & Cantrell*, 138 Cal., 526, where the Court said: (our italics.)

"But the principle stated applies only to cases where the *selection* of the tools used in the work devolves upon the employees engaged in the work generally, one of whom is the person injured, and not

where it devolves exclusively upon the foreman of the work."

In so far as the crew under Gordon was concerned they were furnished the defective material out of which the strap was made and *only that material*. The crew under Gordon was *not furnished* with *any other* material except that. If there was any other material, it was not furnished to the crew under Gordon, as they were ordered to use the particular cable out of which the strap was made, and *none other*. They had no authority to use any other.

"Where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine of fellow servants has no application."

North Chicago Rolling Mill Co. v. Johnson,
114 Ill., 57.

Then again, defendant in error had nothing whatever to do with the furnishing or adjustment of the appliances with which he was to work, or the preparation of the place where he was to work.

A foreman for a mining company who has full control of the property, employees, tools, materials, and has charge of the management and development of a mine, is a vice principal.

Kelley v. Fourth of July Mining Co., 16
Mont., 484.

A foreman in charge of a distinct piece of work in an extensive foundry, and having *under him laborers bound to obey his orders*, is as to them a *vice principal* to their employer, and not their fellow servant, and this although another may be a general foreman of the entire establishment with authority over him. (*italics ours.*)

Hawkins v. Allen & Co., 74 Mo., 13.

Skelton v. Pacific Lumber Co. is another California case which supports the theory of defendant in error that Gordon was a vice principal.

**As the Plaintiff in Error Violated a Primary Duty, the
Effect of the Amendment to Section 1970 of the
Civil Code of the State of California
Is Immaterial.**

Learned Counsel for the plaintiff in error base their entire argument on the question as to whether or not the amendment to section 1970 of the civil code of California created a new cause of action. This contention raises purely a moot question that is foreign to matters before the Court in the case at bar. In their brief they assume that no primary duty on the part of the master exists here and from this unwarranted assumption they proceed in extenso to reason out a technical theory of pleading, that has neither merit nor wisdom to commend it for serious consideration. The complaint states in plain language the cause of action reiled upon, and the record shows that this cause of action was unassail-

ably sustained by the proof. The gravamen of the action is that the plaintiff in error failed to furnish and maintain a safe and suitable appliance, which caused the injury. This being a primary duty imposed on the master, that can not be delegated by him so as to relieve him from liability, he is not permitted to raise the issue as to whether or not the negligent act was done by a fellow servant.

The Ultimate Facts Are All that the Complaint Is Required to Allege.

It is a fundamental principle of pleading that the *Complaint must allege the ultimate fact relied upon to sustain the cause of action.* Evidence of the proof of such fact has no place in the Complaint. In the case at bar the negligence of the master in failing to furnish and maintain a safe and suitable Tommy Moore Strap is the ultimate fact to be proved in order to establish his liability under the common law or under section 1970 of the Civil Code. The negligence of certain enumerated servants in Section 1970 is made the negligence of the master. In other words the master is responsible for their negligence in performance of their duties. Therefore an allegation of negligence on the part of the master is proved by establishing the negligence of the servant named in section 1970. To allege in detail the names of the particular servants and their positions of employment, whose acts make the master liable, could not add to the efficacy of the pleading. At the utmost,

such an allegation could only tend to enlighten the plaintiff in error as to these particular matters. If the plaintiff in error desired further amplification of the Complaint, it should have demurred specially. Having failed to demur specially to the Complaint, it is too late now to raise the point. As a matter of fact the record shows that the plaintiff in error had all the information and enlightenment necessary to make its defense, if it had had a defense.

If a complaint is general in its allegations of negligence and the defendant desires to know upon what particular acts of negligence the plaintiff relies, he must move to have the complaint made more definite and certain, and failing in this the plaintiff may introduce any competent evidence tending to show the negligence of the defendant.

Johnson v. Southern Ry. Co., 69 Am. St. Rep., 849.

Omaha, etc., v. Crow, 69 Am. St. Rep., 741.

Price v. Atkinson, etc., 62 Am. St. Rep., 625.

Fremont, etc., v. Harlin, 61 Am. St. Rep., 578.

Mississinewa Mining Co. v. Patton, 28 Am. St. Rep., 208.

Ohio, etc., v. Walker, 3 Am. St. Rep., 638.

A corporation acts through its agents or representatives. It cannot be otherwise. Its various representatives have different duties to perform. The president has certain duties, the manager certain duties, the superintendent certain duties; and in the case at bar the

foreman (Gordon) had certain duties to perform for the corporation. As testified to by Spain, the superintendent, it was the duty of Gordon as foreman to prepare and use the Tommy Moore Strap, and any carelessness or negligence of his is, in law, the carelessness and negligence of the corporation he represents.

That ultimate facts are only to be pleaded is amply and clearly supported by *McGonigle v. Kane*, 20 Colo., 292, in which the Court said (*italics ours*):

“As a rule, negligence may be pleaded generally. It is an ultimate fact and only ultimate facts are to be pleaded. Bliss in his work on Code pleadings, Note 211a, says: ‘The general allegation of negligence is allowed as qualifying an act otherwise not wrongful. It is not the principal act charged as having caused the injury, but it gives color to the act, makes it a legal wrong; it is the absence of care in doing the act.’ Negligence being the ultimate fact to be established, a general allegation is sufficient. ‘To allege more,’ says Rothrock, J., in *Grinde v. Milw. & St. Paul R. Co.*, 42 Iowa, 376, ‘would be to plead *the evidence*, which is not allowable.’ ”

In the case of *McLain v. Dahlstrom Metallic Door Co., et al.*, decided July 16, 1912, by the Appellate Court of the Second Appellate District of California and reported in Vol. 15 Cal. App. Dec., 112, a demurrer was interposed on the ground that the designation of the servant through whose acts the negligence arose detracted from the charge that defendant's negligence caused the injury. The Court held that such allegation did not vitiate the pleading, but clearly recognized that the real issue was the defendant's negligence.

In pleading the execution of a contract, all that is necessary is to allege that the party sought to be charged executed it. Such an allegation is sustained by proof that the contract was executed by a duly authorized agent, within the scope of his authority. If the plaintiff in error was charged with the purchase price of the strap, all that would be necessary to allege was that it agreed to buy it and had not paid for the same. This allegation would be sustained by proof that the buying was done by a person who in law would bind the plaintiff in error and whose agreement to purchase would be its agreement. So an allegation that plaintiff in error negligently furnished and maintained an unsafe "Tommy Moore" strap would be sustained by proof that the furnishing and maintaining of such strap was done by a person whose negligent act would in law be the negligence of the plaintiff in error. To attempt to distinguish between the two cases as to pleading would be to offend common sense.

The Fellow Servant Rule Is a Defense Under the Laws of the State of California.

While we are loath to take up the time of the Court in discussing a moot question, yet we cannot refrain from answering the contention of learned counsel for plaintiff in error by stating that their interesting theory of pleading is not upheld by the law of the forum. The Supreme Court of California has repeatedly held that the doctrine of fellow-servants is a *defense*. Unless the defendant pleads affirmatively the fellow servant rule as a defense, he is not permitted to rely upon it. If the

defense is not pleaded in the answer, nor in any other way, and the evidence shows the injury to have been caused by the negligence of a fellow servant, the plaintiff can recover, as the question of fellow servant is not at all involved in this case. This is sustained by *Himmelman v. Cofran*, 36 Cal., 411, in which the Court decided:

"If the defendant had desired to set up as a defense that the order to move the car was not given by the defendant, but by the foreman of its blacksmith shop, it should have made the proper averments to that effect in the answer, *in order that an issue might be raised in that point. No such issue having been made or tendered, the instructions which were refused were irrelevant.*" (our italics.)

In *Bjorman v. Fort Bragg, etc.*, 104 Cal., 629, the Court, referring to the negligence of a fellow servant, said:

"This was an affirmative defense, and the burden was clearly on the defendant to establish it."

In *Gibson v. Sterling Furniture Co.*, 113 Cal., 6, it was claimed that the injury resulted from the negligence of a fellow servant. The Court held otherwise, as "there was no such issue or question in the case in the pleadings."

Again the above rule was approved and affirmed in *Tayng v. Mt. Shasta, etc., Co.*, 135 Cal., 143, when the Court held:

"*The negligence of a fellow servant can only be invoked when it is set up as an affirmative defense to a right of recovery.*" (our italics.)

That the object of the amendment of 1907 is to curtail a defense has been decided by the Supreme Court in two recent cases. In the case of *Pritchard v. The Whitney Estate Company*, decided June 13th, 1913, the Court stated:

"The main purpose of the amendment to that section, adopted in 1907, was the modification of the 'fellow servant' doctrine whereby only pleading and proof that the injury or death was caused by the negligence of a co-employee in the same department of labor with the person injured or killed was available as a defense. *The legislature might well have believed that in thus curtailing this defense* * *"

43 Cal. Decisions, page 678.

So in the case of *Judd v. Letts*, 158 Cal., 359, the Court said, referring to the amendment:

"While the proviso is framed in a manner that may leave a doubt concerning the proper relation of some of the phrases, we think it quite clear that the intent of the amendment was to take from all classes of employers the benefit of the fellow servant rule, in cases where the employee injured and the one at fault are engaged in different departments of labor."

Plaintiff in Error, by Its Answer, Put In Issue the Negligence of the Foreman Gordon.

The Answer alleges:

"And for a further and separate answer and defense herein, the defendant alleges, upon information and belief, that the injuries alleged to have been caused by the negligence and carelessness of a fellow servant of said plaintiff, then in the employ of the defend-

am and engaged in the same general business and particular occupation as and with said plaintiff." (Tr. p. 39.)

This allegation is broad enough to cover and include any person employed by plaintiff in error in the same general business in which defendant in error was employed.

This includes all the employees whose negligent acts, under the amendment to section 1970 Civil Code, cannot be plead by plaintiff in error as a bar to its responsibility. There are certain fellow servants whose acts of negligence cannot now be plead as a bar, although employed in the same general business as the injured employee. But plaintiff in error, instead of confining his defense to just that particular kind of a fellow servant whose negligent acts could be plead as a bar, alleged that the injury was caused by the negligence of a person employed in the same general business, which would include the foreman, Gordon, performing a non-primary duty. A superior or a person employed at another machine in the same line of work, would be a person employed in the same general business. Among those employees engaged in the same general business there are now certain accepted ones whose acts cannot be plead as a bar. Plaintiff in error paid no attention to these, but pleaded as a defense as well the negligence of fellow servants for which he was responsible as the negligence of those for which he was not responsible. Instead of eliminating superiors, he included them.

If it were contended, however, that the allegation only referred to employees for whose acts the employer

is not responsible, evidence would be admissible on the part of defendant ^{in error} to overcome this by showing that it was done through the negligence of a fellow servant whose acts was not a bar.

Plaintiff in error also set up special defenses as follows:

"And for a further and separate answer and defense herein, the defendant avers that the injuries alleged to have been suffered by plaintiff were the result of plaintiff's own carelessness and negligence." (Tr. p. 39.)

It also alleged that the carelessness and negligence of the defendant in error directly contributed to and were the approximate causes of said injuries (Tr. pp. 39 and 40). All these new matters and defenses set up in the answer are deemed denied by defendant in error under section 462, Code of Civil Procedure of the State of California, and any evidence tending to overcome said new matter or defenses or disprove the same becomes relevant and material under the pleadings. In other words, under the allegation that the "injury was caused by the negligence of a fellow servant in the same general business as defendant, *evidence that the foreman Gordon, negligently caused the injury was admissible, and his negligence became an issue in the case*; under the allegation that the injury was caused by the negligence of defendant in error and that his negligence was the proximate cause of the injury, *evidence that it was caused by the negligence of the foreman, Gordon, was admissible to disprove that it was caused by the negligence*

of defendant ^{in error} and Gordon's negligence thereby became an issue in the case.

Plaintiff in error, referring to the Tommy Moore strap, also alleged "that defendant used ordinary and reasonable care in the selection of the same." (Tr. p. 35.) Under this allegation evidence was admissible to show how the selection was actually made.

In Rankin v. Sisters of Mercy, 82 Cal., 95, the lower court admitted an instruction on undue influence to the jury and the defendant objected on the ground that there was no such issue. The defendant was not sustained on this point as the issue was raised by defendant's answer, the Court saying:

"We think that the *issues raised by the pleadings* were sufficient to justify the instruction. Under our system of pleading, the plaintiff is not required to reply to any new matter or affirmative defense set up in the answer, *but it is deemed denied and may be met by any competent proof.*" (our italics.)

Referring to Moore v. Copp, 119 Cal., the Appellate Court in Barker v. Barker, 9 Cal. App., 740, said:

"It was contended by appellant in that case that the *special issues were improperly allowed because not alleged in the complaint.* The Supreme Court held against this contention, saying: 'In the first instance the law requires defendant to answer; but when he does so, the law in the other instance operates to make the answer for the plaintiff without any replication on his part.' *The many cases decided show various issues thus permitted to be tried.*" (our italics.)

Note the following language in said *Barker v. Barker*, 9 Cal. App., 741, to-wit:

"The defendant, having in his answer and not by way of cross complaint, set forth the nature of his claim, it indeed would be a curious rule of pleading under our system *which would estop her from proving, under the pleadings as they appear here, any fact which would tend to disprove the spuriousness of his claim.*" (our italics)

So, in the case at bar, there was nothing to estop defendant in error from *proving the spuriousness* of the claim of plaintiff in error that the negligence of defendant in error caused the injury by showing that Gordon's negligence caused the same.

The point here raised was squarely decided against plaintiff in error in *Magee v. N. P. C. R. R. Co.*, 78 Cal., 435, where the Court, in passing upon the overruling of an objection to a question asked plaintiff if he knew of the defect causing the injury, it not being alleged in the complaint that he knew of the defect, said:

"We think it was relevant; for while, as has already been shown, the complaint contained no allegation of plaintiff's ignorance, the answer 'alleges and charges the fact to be, that whatever injuries were sustained by said plaintiff were caused solely and wholly by his own carelessness and negligence, and that but for his own carelessness and negligence he would not have been injured.' 'This allegation must be deemed denied by plaintiff, *and it raised an issue to which the evidence was applicable, and if so, such evidence was not irrelevant nor incompetent.*" (our italics.)

The doctrine of aider by the pleading of the opposite party is discussed by Bliss in his work on Code Pleading under section 437 of said work. Mr. Bliss says:

"It is a rule of common law that an omission to state a material fact, either in the declaration or special plea, may be supplied by the pleading of the opposite party * * * When the defendant chooses to understand the plaintiff's count to contain all the facts essential to his liability and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy.' * * * There is nothing technical or artificial in this doctrine of aider, and it continues to be recognized in Code pleadings."

Conclusion.

The evidence clearly shows that the "Tommy Moore" strap was a permanent appliance and that plaintiff in error violated a primary duty in furnishing a defective one, and that Gordon was a vice principal. The contentions of plaintiff in error are entirely foreign to the real issues involved, as a primary duty was negligently performed. Even if a primary duty had not been violated the complaint would be sufficient, as the amendment to section 1970 only curtailed an affirmative defense, and the ultimate fact is all that is required to be pleaded. The acts of the foreman, Gordon, were not only put in issue by the complaint, but also by the affir-

mative defense set up by the answer of the plaintiff in error.

We respectfully contend that judgment should be affirmed.

PUTER & QUINN,
Attorneys for Defendant in Error.

IN THE
United States Circuit Court of Appeals
FOR THE
~~NINTH~~
~~NORTH~~ JUDICIAL CIRCUIT

METROPOLITAN REDWOOD LUMBER
COMPANY (a corporation),

Plaintiff in Error.
(Defendant below.)

vs.

HUGH DAVIS,

Defendant in Error.
(Plaintiff below.)

SUPPLEMENTAL BRIEF FOR PLAINTIFF
IN ERROR.

At the oral argument of this case, certain questions were discussed as to which permission was granted by this Court to file a supplemental brief.

To discuss these questions in order:

I. CAUSE OF ACCIDENT.

FROM THE EVIDENCE ADDUCED, THE CAUSE OF THE
ACCIDENT WAS MERELY A MATTER OF CONJECTURE,
AND VERDICT BASED THEREON CANNOT STAND.

The *only* evidence as to the accident itself is contained at pages 60 and 61 of the transcript, and is as follows:

Plaintiff testified (p. 60):

“When this accident happened the log was not on my section. I was watching for it to come into my section. Then the strap broke. The strap that was around the stump, the “Tommy Moore” strap on this side, and it threw it around and hit my leg”

And again at page 61:

“It was the end of the cable that struck me It was the end of the line that struck me. It broke on the opposite side and swung around. It was the end of it hit me, but I don’t know how near it was to the end of the line. It was something like two feet or three feet.”

The strap itself was not offered in evidence and the only fact shown is that somewhere along its length it broke.

It should be noted that this very strap had been in use continuously for two or three weeks before the accident. As to this, plaintiff’s witness Laird testifies (tr. p. 71):

“I could not say exactly how long before the accident that strap was made It was approximately two or three weeks.”

Plaintiff himself at page 64 testifies that in about fifteen days it worked eight or nine days and that in these days

“They may have pulled on some days twenty, some days thirty, some days they would not pull in ten.”

It was not shown that any accident had happened in the use of this strap before, although plaintiff, himself, worked with it and in its immediate vicinity during all of that time.

Again it was not shown that the load carried at the time of the accident was less than or equal to the usual haul.

Certainly from these facts it would not appear that the break was due to any inherent defect or weakness in the strap.

To say nothing of the possibility that the break might have been caused by an excessive strain, whether through weight of the load or its having been caught in some obstruction on the ground, it was again equally possible that the break occurred at the splicing.

Plaintiff's witness Laird testifies at page 73:

“I had much difficulty in making the splicing.”

And Casey, also plaintiff's witness, testified at page 79:

“We had trouble splicing it. We could not pull the strands through.”

The accident, then, may have happened through any one of several causes:

1. The alleged insufficiency of the strap.
2. A latent defect in it.
3. Its improper use or over-straining.
4. The improper splicing.
5. Its improper adjustment to the stump.

There was *absolutely nothing* in the evidence to show to which of these causes the accident was attributable; and under these conditions a verdict for plaintiff must have been based on mere conjecture and cannot stand.

Almost the same conditions existed in the case of

Pierce v. Kile, 80 Fed. Rep. at 867;

an action by employee against his employer, based on the breaking of an allegedly defective rope.

In ruling that defendant was entitled to a directed verdict, the Circuit Court of Appeals for the Seventh Circuit, said:

“There was no evidence, other than the fact that the rope broke, to suggest insufficiency or defect. The general rule is not disputed that, as between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master. (Citing cases.) The proof to warrant such inference must be brought forward by him who charges

the negligence, and upon whom is the burden of proof. *The inference of negligence cannot be established by conjecture or speculation, or drawn from a presumption, but must be founded upon some established fact.* The law of the case was correctly apprehended and stated by the court in its charge to the jury, but the court erred in not directing a verdict for the defendant below. There was absolutely no evidence, other than the fact of the breaking of the rope, from which negligence of the master could justly be inferred. *The accident may have occurred from (1) the insufficiency of the rope, (2) a latent defect of the rope, (3) its improper use and overstraining, (4) the manner of its adjustment to the standard, (5) the character of the standard used.* It is urged that it was proper to submit the case to the jury upon the ground that they had the right to infer that the rope was insufficient, for the reason that the other possible causes of the accident were excluded by the evidence. This reasoning is fallacious in its premises. The evidence did not exclude all other probable causes of the breaking of the rope. To the contrary, it suggests as strongly probable that the accident was due to a great and inconsiderate strain upon the rope during the obstruction of the pile, and while Davis was endeavoring with the pinch bar to overcome the obstruction, and before it could be surmounted, and through the great lateral strain upon the rope caused by the pulling on it by 15 or 20 men while the pile was thus obstructed. Whether that be the correct solution of the cause of the accident or not, it is certain that not only were all other probable causes of the insufficiency of the rope not excluded by the evidence, but the testimony clearly established its sufficiency. The plaintiff below, therefore, had failed to establish any neglect of duty upon the part of the defendant below causing this injury, and it was error not to direct a verdict as requested."

It will be seen that *practically every possibility adverted to by that Court exists in this Case.*

The leading case on this subject is

Patton v. Texas, etc., Rd. Co., 179 U. S. 658,
45 L. Ed. 361;

where the Supreme Court lays down the rule as follows:

“It is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And when the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.”

The same rule is laid down in the Federal Courts in

Northern Pac. Co. v. Dixon, 139 Fed. 740;
Moit v. Ills. Cent. R. Co., 153 Id. 356;
Carnegie S. Co. v. Byers, 149 Id. 669;
Minneapolis, etc., Co. v. Cronin, 166 Id. 659;
Midland, etc., Co. v. Fulgham, 181 Fed. 95.

And as recently as in the case of

Smith v. Ills. Cent. R. Co., 200 Fed. at 555.

To these may be added the case of

Hofnaner v. White, 70 N. E. (Mass.) 1033

when the Court said:

“If there were other causes besides the fact of the fall of the chest itself that may have produced such a result, the plaintiff is obliged to go further and eliminate them by showing that they did not operate.”

And the California case of

Puckhaber v. S. P. Co., 132 Cal., at 365,

where it is said:

“It would be a guess, pure and simple, upon the part of the jury to so find as a fact, and a verdict and judgment cannot rest upon a foundation created upon a guess. It is as necessary for the plaintiffs to show that defendant’s negligence caused the injury, as it is for them to show that defendant was guilty of negligence, or that the party was injured.”

Of the five possibilities of the cause of the accident heretofore enumerated, there was only one for which defendant could have been held liable—the first. For the second it would not have been liable, and for the third, fourth and fifth it equally would not have been liable, because these were acts done by the fellow servants of plaintiff. The case then would come within the rule set forth in the Patton case

and the verdict would after all be a guess and unsupportable as a matter of law.

II. ASSUMPTION OF RISK.

PLAINTIFF CLEARLY ASSUMED THE RISK OF THE ACCIDENT TO HIM.

The question of assumption of risk has so recently been passed upon by this Court in the case of

Williams v. Bunker Hill, etc., Co. 200 Fed. Rep. 211,

that it will be unnecessary to add other Federal cases.

Reference may be made, however, to the clear statement of the doctrine and of its limitations in the case of

Bresette v. Stone Co., 162 Cal. 74.

It is submitted that all of the elements necessary to constitute assumption of risk appear in this case.

1. Plaintiff's employment and duty brought him into the use of and close proximity to the strap.

As he states at page 64:

"My duty was to watch the log through the 'Tommy Moore', through the 'Tommy Moore' block, and signal to the engineer, signal the engineer to go ahead as soon as I changed it over."

2. He worked with the rigging crew in work of this character from about April first, 1910, to August 15, 1910, when he was injured. (Tr. p. 63.)

3. He oiled this particular strap (Tr. p. 64).

4. He worked, in the discharge of his duties, with this particular strap, for about fifteen days (Tr. p. 64).

5. If there was any danger, it was an obvious one, as Laird testifies (Tr. p. 73): “It was worn; *you could not tell it by looking at it even, and without handling the line any at all, you could tell it was worn.*”

6. The employees were expected to look out for their own safety. As Casey testifies (Tr. p. 83): “We had to look out for ourselves above here.”

7. And plaintiff fully knew and appreciated the danger. As he testifies (Tr. p. 69): “If the line would break or anything would fly I would be in danger. I don’t know if the line was apt to break. It might break. I could not stand there and do my work anyway.”

It is submitted that an assumption of risk is clearly shown and that plaintiff is not entitled to recover.

In the Williams case cited above, this Court says:

“Williams, by entering upon and remaining in the employment of the mining company, assumed the ordinary risks and dangers of the employment he was in, and of the extraordinary risks and dangers of such employment which

he knew and appreciated. But the risk of the mining company's negligence and of its effect were not of the ordinary risks of Williams' employment, unless such negligence or the effect thereof was known and appreciated by him, or was obvious; that is, plain to be observed and understood by him by reasonably using his senses. Of course, an employe who knows and appreciates the hazards of his service, and those risks which are apparent to ordinary observation, assumes the risks incident to his situation. Neither do we lose thought of the established rule that when a defect is obvious, or so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence, and experience, and the danger and risk from it are apparent, the servant will not be heard to say that he did not realize or appreciate them."

And in the course of the discussion, there is quoted the case of

Butler v. Trazee, 211 U. S. 459, 53 L. Ed. 281,

when the Supreme Court says:

"Where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

III. KNOWLEDGE OF DEFENDANT.

THE EVIDENCE FAILED TO DISCLOSE THAT DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT ANY MATERIAL FURNISHED by it was defective.

It is of course undisputed law that it must be shown by plaintiff that defendant knew or ought to have known that the appliance was defective. No such evidence appears here.

Even if ^{it} ~~he~~ be conceded that the Foreman Gordon knew that the material he gave for the construction of the strap was defective, *there is no evidence that defendant furnished this to Gordon to be given to the crew.*

There was in the immediate vicinity of the work a new piece of cable of about four or five hundred feet out of which this strap could have been made (see testimony of Casey, Tr. p. 81; Spain, Tr. p. 89).

And there ^{were} ~~was~~ also about two thousand feet of line, equally available, about seventy-five or eighty feet away. (Testimony of Spain, Tr. pp. 89, 97, 98, 99.)

Instead of using either of these, Gordon went quite a distance away and selected other material which it is claimed he stated he knew was defective.

While it is claimed that Gordon stated that "they" told him to take the old line, it is not shown who the

“they” were, and Gordon did not say who it was. (Tr. p. 74.)

While a master is of course liable for the acts of his servant, the imposition of such a liability here would strain the doctrine to the breaking point. Certainly it cannot be assumed either as a matter of technical law or of common sense, that when a master has at the very spot and in close proximity to that spot furnished adequate safe materials and appliances, he can be held liable when his employee, without his knowledge, does not use these but goes to a remote part of the plant and selects an obviously dangerous substitute.

For all the considerations above stated, it is respectfully submitted that the judgment be reversed.

LILIENTHAL, MCKINSTRY & RAYMOND,
 MAHAN & MAHAN,
 KENNETH NEWETT,
Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
FOR THE
NORTH JUDICIAL CIRCUIT

METROPOLITAN REDWOOD LUMBER
COMPANY (a corporation),

Plaintiff in Error.
(Defendant below.)

vs.

HUGH DAVIS,

Defendant in Error.
(Plaintiff below.)

ANSWER TO SUPPLEMENTAL BRIEF.

Learned Counsel for Plaintiff in Error in their Supplemental Brief contend that, "*From the evidence adduced, the cause of the accident was merely a matter of conjecture and verdict based thereon cannot stand.*"

We submit that it is a *matter of conjecture* with us how the learned counsel came to such a conclusion, when the record shows beyond controversy that the strap was made of an old, worn out, rusty, worthless piece of cable that was not big enough to be used for a Tommy Moore

strap and that by reason of such condition the strap broke. The uncontradicted testimony of the witnesses Laird and Carey is conclusive on this point.

Laird testified:

"Well it was a very poor piece of line in my estimation." Page 72. "It was worn; you can tell by looking at it even, and without handling the line at all, you can tell it is worn; in the first place it is small. I should not think that it was big enough to be used for a strap for a 'Tommy Moore' from what I knew about them. I should judge it was *an inch and an eighth line in diameter or it had been*. The strands were worn. The strands would break off, when we would go to push them in through the wire, they would break; the wire strands would break and fly back when we pulled the line through. I went on and helped to splice the line with these other two gentlemen. *It showed indications of being worn out*. I had much difficulty in making that splice." Page 73.

Witness Carey testified, page 79:

"The cable was in poor condition. The cable was worn out. We had trouble splicing it. We could not pull the strands through; it was all chipped and broken off on account of the worn condition. *It was rusted out*."

"The log was upon the runway when the strap broke. I did not see anything interrupting the log or striking stumps or anything of that kind. When the strap broke there was nothing in front of the log at the time. It was in the roadbed." Page 79.

Witness Breunius testified, page 86:

"When the accident happened it was an ordinary pull. We were pulling ordinarily when that gave away."

The testimony of Defendant in Error stands uncontradicted on the question as to whether the strap broke or the splice gave away:

"It was the end of the line that struck me. It broke on the opposite side and swung around. It was the end of it hit me, but I don't know how near it was to the end of the line. It was something like two feet or three feet." Page 61.

The above testimony is a complete answer to the argument contained in Plaintiff in Error's Supplemental Brief. In substance the strap was constructed from unsafe and incompetent material and broke solely by reason thereof.

The uncontradicted testimony shows that the strap was made of an old, rusty, worthless piece of cable, entirely unfit to be used for the purpose of a Tommy Moore Strap and that the strap broke about two feet or three

feet from the end by reason of the lack of tensile strength sufficient to sustain the usual burden placed upon it. The engineer Breunius testified that "When this accident happened it was an ordinary pull. Carey testified that "When the strap broke there was nothing in front of the log at the time."

The record shows that the Plaintiff in Error failed to contradict any of the above positive testimony. Such being the case, the facts testified to are admitted facts in the case. *De hors* the record, if such testimony was untrue, it surely was an easy matter for Plaintiff in Error to show that fact. Why did not Plaintiff in Error produce the strap in evidence? It was in its power to do so, if there was any question as to the correctness of the testimony given in evidence in reference to the fitness of the strap and the place where it broke.

It is also contended that Defendant in Error "clearly assumed the risk of the accident to him." The record does not uphold such a conclusion. Section 1970 of the Civil Code of California provides: "Knowledge of an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee *fully understood, comprehended and appreciated* the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof."

The evidence shows without contradiction that the Defendant in Error had absolutely no knowledge of the defective or unsafe character or condition of the strap or *that he fully understood, comprehended and appreciated the dangers incident to the use of it.*

Defendant in Error testified (page 65):

"I saw the strap every day and every time a log came along, but *I did not take any notice. I did not look at it to see whether it was defective.* * *
* *I do not know what they made it out of."*

On page 68 he testified:

"*It was there but I did not pay any particular notice of it. I could have examined it if I wanted to. I thought there was no need of it. I HAD NO EXPERIENCE IN LINES.* * * * *I didn't know it needed examining; in the first place I didn't know anything about it.* * * * *I did not examine it. I did not know what size it was or anything about it.* * * * *I don't know if the line was apt to break."*

On page 70:

"I never was there when the strap was made at all. I had nothing to do with the handling of it at all. I never put the 'Tommy Moore strap' upon the stump."

This testimony stands admitted and is a complete answer to the argument advanced by learned counsel in the Supplemental Brief.

We respectfully submit that the judgment be affirmed.

PUTER & QUINN
Attorneys for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN REDWOOD
LUMBER COMPANY (a Corpor-
ation),

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

PETITION FOR REHEARING.

Plaintiff in error respectfully petitions this Court for a rehearing of this cause upon the following grounds:

I.

That the evidence does not show that the "Tommy Moore" strap was a permanent device.

II.

That the evidence does not show beyond reasonable doubt that the accident was attributable to the condition of the cable.

III.

That this Court has not discussed or considered the argument of assumption of risk.

(1) In its opinion this Court finds that the device was a permanent one.

According to plaintiff's own testimony (Trans., p. 67, fol. 57) the line and, consequently, the strap was changed two or three times in two weeks, and according to testimony of the same witness (page 64, fol. 54) it had been there some nine or ten days before the accident, but they were not working more than half the time.

As appears throughout the testimony, this "Tommy Moore" strap was used as a means of changing the direction of the cable and was necessarily either shifted from stump to stump as the direction of the haul changed, or a new one was made from time to time, but every time that the direction of a haul was changed, the position of the strap was changed.

As testified by witness Spain (page 93, fol. 77), "These straps would have different lengths depending upon the location of the stump to the roadway.

* * * *They have to make a new 'Tommy Moore' strap for each new direction in which they draw the*

logs, that is, unless it was a straight pull, or unless a former strap would answer the purpose. It is made with two eye splices in it, one on each end, one eye splice on each end, and as the crew are directed to go, or as they go to different logging operations, they themselves have to make a strap *for each new situation.*"

This Honorable Court quotes a portion of the testimony of the same witness on page 97, folio 81, but while he states that it was a permanent contrivance, he states that it was permanent only as long as they used the road hauling logs "*down there to that landing.*"

Certainly it should not be said that there was anything permanent in the contrivance in the way that a tunnel is permanent as was held in the case of *Hanley vs. Cal. etc. Company*, 127 Cal. 232, or in which piers are permanent, as was held in *Majors vs. Connors*, 162 Cal. 134-135, which are the cases relied upon by the defendant in error. The rule is rather that announced in *Leishman vs. Union Iron Works*, 148 Cal. 374, or *Callan vs. Bull*, 113 Cal. 593, or *Burns vs. Sennett*, 99 Cal. 363.

(2) We again respectfully urge that the evidence does not clearly show such a condition of the strap as to preclude the possibility that the accident arose because of some other circumstance. While this Honorable Court states that plaintiff in error had the possession of the strap and might have produced it in evidence, we submit that there is nothing in the evi-

dence to show this, and as far as the information received by the writer of this brief goes, plaintiff in error did not have the possession of the strap after the accident.

While it is true that witnesses testified that the outside strands were broken, still this was a cable of 1 1-8 inches in diameter, and as testified by Mr. Spain, any cable no matter what its inside condition was, might be rusted within a night or two. (Trans., p. 96, fol. 79.) Nothing that was clearly testified to by any of plaintiff's witnesses definitely shows the presence of more than a mere surface rust, and certainly the fact that the outer strands would break off was no indication of any weakness in the tensile strength of the cable itself. Accordingly we respectfully urge again the argument set forth in pages 1-8 in the supplemental brief of plaintiff in error.

(3) This Honorable Court did not consider the question of assumption of risk argued in the supplemental brief.

It is stated in the opinion that the defects were visible to the eye and were patent. If this were so, the argument of assumption of risk becomes the more potent. We respectfully urge upon this Court the consideration of this phase of the matter.

All of the elements of assumption of risk occur in this case.

We are the more urgent in asking for a rehearing of this matter because in so far as the plaintiff in

error is concerned, the judgment seems unfair. It is true that the defendant in error was injured, but in order to hold plaintiff in error liable, there should be some clear legal ground of liability shown.

The rule of law is well established that there is no *absolute* liability on the part of the employer to furnish safe materials, but that he must exercise merely *reasonable care* in such supply, and when it is considered that practically at the very feet of Gordon there was cable adequate in amount and character for the purpose of making such a strap as should be needed, it would seem that plaintiff in error did exercise that *reasonable care*.

The foundation of all liability of negligence is the reasonable anticipation of what will happen in the event of a certain act, and most certainly it cannot be claimed that plaintiff in error could have reasonably anticipated that Gordon would have gone to a remote spot and overlooked the new piece of cable in the immediate vicinity of his work and the 2000 feet of cable about 75 or 80 feet away from him. It is as though a section boss on an extensive railway system were to go miles away from the place of the operations of a section gang, overlooking new material at his feet to supply to his gang defective material which he found at this remote spot. As was said in the supplemental brief, this would seem to be the straining of the doctrine of *respondeat superior* to the breaking point.

It is respectfully submitted that this cause be reheard.

LILIENTHAL, MCKINSTRY & RAYMOND,
MAHAN & MAHAN,
KENNETH NEWELL,

Attorneys for Plaintiff in Error.

I hereby certify that in my judgment the above and foregoing petition for rehearing is well founded and that it is not imposed for delay.

ALBERT RAYMOND,
Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

M. N. WILLIAMSON, Trustee in Bankruptcy of the
Estate of GEORGE M. IKEDA, Bankrupt,

Petitioner,

VS.

W. M. RICHARDSON,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress
Approved July 1, 1898, to Revise in Matter of
Law a Certain Order of the United States
District Court for the Northern District
of California, First Division.

FILED

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United States
Circuit Court of Appeals
For the Ninth Circuit.

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INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals,
Ninth Circuit.*

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Petition for Revision.

To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Judicial Circuit:

The petition of M. N. WILLIAMSON respectfully shows that he is a citizen of the United States and of the State of California, and resides in the city of Sacramento, State of California;

That on the 20th day of September, 1909, the above-named George M. Ikeda was duly adjudged a bankrupt by the District Court of the United States for the Northern District of California, and thereafter your petitioner, M. N. Williamson, was duly and regularly appointed trustee in bankruptcy and duly qualified, and is still acting as such trustee;

That heretofore one W. M. Richardson, claiming to be the owner of 357 bales of hops in the possession of your petitioner, M. N. Williamson, as trustee of the above-named bankrupt, filed a petition in said bankruptcy proceeding, claiming to be the owner of said 357 bales of hops and demanding possession thereof;

That the title to said 357 bales of hops at the time of adjudication in bankruptcy was in the above-named George M. Ikeda, and ever since said time has been and now is the property of said bankrupt estate;

That after the filing of said petition by said W. M. Richardson claiming to own said hops, an application

was made before J. F. Pullen, Esq., one of the referees in bankruptcy, in the District Court of the United States for the Northern District of California, to compel the surrender of said 357 bales of hops to said W. M. Richardson, which application was thereafter denied by said referee:

A certificate of review was thereafter granted to the District Court of the United States for the Northern District of California, by the said referee upon the denial of the said application, and on or about the 13th day of June, 1912, an order was entered by the said District Court reversing the order made by said referee as to 216 bales of said hops and affirming said order as to the remaining 141 bales of said hops.

A copy of the Return and Report and Findings of the referee containing the pleadings and evidence on which the matter was submitted is hereto attached, marked Exhibit "A," and by reference thereto made a part hereof.

A copy of the Petition for Review of said referee's order is hereto attached, marked Exhibit "B," and by reference thereto made a part hereof.

A copy of said order of the District Court reversing said referee as to 216 bales of hops is hereto attached, marked Exhibit "C," and by reference thereto made a part hereof.

Said order of said District Court as to said 216 bales of hops was and is erroneous as a matter of law, in that,

1. Your petitioner, M. N. Williamson, as trustee of the estate of George M. Ikeda, a bankrupt, was and

is entitled to said 357 bales of hops, as a matter of law;

2. The legal title to said 357 bales of hops was vested in the said George M. Ikeda at the time of the adjudication of the said George M. Ikeda as a bankrupt.

3. The evidence shows as a matter of law that none of said 357 bales of hops were ever delivered to W. M. Richardson.

4. Under the statutes of the State of California, upon which your petitioner relied to defeat the claim of W. M. Richardson, the said W. M. Richardson is without right to assert title to the said 357 bales of hops, or any of them.

WHEREFORE, your petitioner, feeling aggrieved because of said order, asks that the same may be revised in matters of law by this Honorable Court as provided in section 24B of the Bankruptcy Act and rules of practice in such cases provided, and that the same be reversed as to said 216 bales of hops, and for such other and further relief as may be just and proper.

Dated December 10th, 1912.

M. N. WILLIAMSON,
Petitioner.

DEVLIN & DEVLIN,
Attorneys for Petitioner.

State of California,
County of Sacramento,
City of Sacramento,—ss.

I, M. N. Williamson, the petitioner mentioned and described in the foregoing petition, do hereby make

solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

M. N. WILLIAMSON.

Subscribed and sworn to before me this 10th day of December, 1912.

[Seal]

S. W. DOWNEY,

Notary Public in and for the County of Sacramento,
State of California.

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 6307.

In the Matter of GEORGE M. IKEDA,

In Bankruptcy.

**Praeipce for Transcript of Record on Petition for
Revision.**

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript for use on Petition for Revision of M. N. Williamson to the United States Circuit Court of Appeals for the Ninth Circuit from the decision of the above Court entered June 13, 1912, consisting of the following files, records and papers in the above-entitled cause:

1. This Praeipce.
2. Return and Report and Findings of Referee.
3. Petition for Review of Referee's Order.
4. Memorandum Opinion Reversing Referee's Order.

5. Order of Court Reversing Referee.

DEVLIN & DEVLIN,
Attorneys for M. N. Williamson.

[Endorsed]: Filed December 12, 1912. W. B.
Maling, Clerk. [1*]

Exhibit "A."

*"In the District Court of the United States for the
Northern District of California.*

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Return and Report and Findings of Referee.

On the —— day of October, 1909, W. M. Richardson filed with the Referee in Bankruptcy a petition asking that three hundred and fifty-seven (357) bales of hops in possession of the trustee of the above-named bankrupt be delivered to him. This petition alleged that the said W. M. Richardson was the owner of said hops. The petition was filed originally with the Referee in Bankruptcy, without having been referred to him by order of Court, and is in the words and figures following, to wit:

*"In the District Court of the United States for the
Northern District of California.*

No. 6307.

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Petition for Possession of Personal Property.

To the Honorable J. J. DE HAVEN, Judge of the
District Court:

*Page-number appearing at foot of page of original certified Record.

The petition of W. M. Richardson respectfully shows :

1. That the petition of the bankrupt above named was filed in this court on the 20th day of September, 1909, and thereafter, on said day, the said George M. Ikeda was duly adjudged a bankrupt.

2. That on the 3d day of March, 1909, your petitioner and said George M. Ikeda entered into a contract, by the terms of which your petitioner agreed to buy and said George M. Ikeda [2] agreed to sell to your petitioner 80,000 pounds of hops grown during the year 1909, and the product of that certain piece or parcel of land situate in the county of Sutter, State of California, and particularly described as follows, to wit: Consisting of about 65 acres commonly known as the 'Rideout Ranch' and leased by said George M. Ikeda. That by the terms of said agreement your petitioner was to pay therefor the sum of 8¢ per pound upon the delivery of said hops.

3. That said contract provided that your petitioner should make advance payments on said crop of hops on certain dates in said contract specified. That petitioner paid to said Ikeda prior to the filing herein of the petition in bankruptcy all of the sums specified in said contract as advance payments as well as certain additional sums on the purchase price of said hops, requested by said bankrupt prior to the filing of his petition in said bankruptcy. That it was provided by said contract that all payments made by said petitioner to said bankrupt on the purchase price of said hops prior to date of delivery should bear interest at the rate of 6% per annum.

That the total of said advance payments and of payments made on the purchase price of said hops, with interest thereon as provided in said contract, amounted to the sum of \$5,397.75 on the date of the filing of the petition in bankruptcy in the above-entitled matter.

4. That prior to the 20th day of September, 1909, your petitioner, in accordance with the terms of said contract, inspected and accepted all the hops of said bankrupt grown on the premises which had been baled at the date of said inspection. That all of the hops so inspected and baled amounted to 216 bales and were of the weight of 42,357 pounds; that at the date of said acceptance, petitioner had paid on the purchase price of said hops the sum of \$5,397.75. That petitioner at the time of said [3] acceptance marked all of said 216 bales with a stencil as follows:

‘C. S. MAY & CO., ALBANY, NEW YORK.’

That said C. S. May & Co. were consignees to whom your petitioner was shipping said hops; that said 216 bales were all of said hops that had been baled at the time of said inspection and acceptance.

5. That thereafter and before September 20, 1909, all of the hops grown by said bankrupt on the above-described real property were baled by said bankrupt and weighed and accepted by your petitioner. That all of said hops baled amounted to 357 bales, including said 216 bales theretofore baled and accepted.

6. That thereafter petitioner removed all of said 357 bales of hops from said Rideout Ranch and hauled the same to the railroad station at Chandler, Sutter County, California, and had loaded a portion

thereof on cars of the railroad company. That M. N. Williamson, as receiver appointed by the court in the above-entitled matter, then and there demanded said hops, and against the will of petitioner took possession of the same from petitioner and retained possession thereof until his appointment as trustee as hereinafter set forth.

7. That on the 5th day of October, 1909, said M. N. Williamson was duly elected trustee in said matter, and on the 14th day of October, 1909, he duly qualified as such trustee, and ever since has been and now is the duly elected, qualified and acting trustee in the above-entitled matter. That said trustee thereupon took possession of said 357 bales of hops, and ever since has been and now is in possession thereof.

8. That petitioner has demanded of said trustee the delivery of said hops to petitioner, but said trustee refuses, and still does refuse, to surrender the possession of the same or of any part thereof. [4]

9. That said hops are of the total weight of 70,020 pounds, and the price thereof, at the rate fixed by said contract, is the sum of \$5,601.60. That there is a balance due on said hops from your petitioner to said bankrupt amounting to the sum of \$203.85. That at the time said demand was made on said trustee as hereinbefore set forth, your petitioner tendered to said trustee in legal money of the United States said sum of \$203.85.

WHEREFORE, your petitioner prays judgment against said bankrupt and said trustee for the possession and return to petitioner of said 357 bales of hops upon the payment by your petitioner to said

trustee of the sum of \$203.85, being the balance due from your petitioner to said bankrupt on the date of the filing of the petition in bankruptcy herein, and for such other and further relief as to the Court may seem meet and equitable.

W. M. RICHARDSON,
By WHITE, MILLER & McLAUGHLIN,
His Attorneys.

State of California,
County of Sacramento,—ss.

W. M. Richardson, being duly sworn, says: That he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the matters therein stated are true.

W. M. RICHARDSON.

Subscribed and sworn to before me this 21st day of October, 1909.

[Seal] IRVING NEEDHAM,
Notary Public in and for the County of Sacramento,
State of California.” [5]

On the 5th day of November, 1909, the trustee of the above-named bankrupt, to wit, M. N. Williamson, filed an answer to the above petition of claimant denying the material allegations of the petition and alleging that the above bankrupt estate was the owner and entitled to the possession of said 357 bales of hops. This answer is in the words and figures following, to wit:

*"In the District Court of the United States for the
Northern District of California.*

No. 6307.

In the Matter of GEORGE M. IKEDA,

Bankrupt.

**Answer of Trustee to Petition for Possession of
Personal Property.**

Now comes M. N. Williamson, trustee in bankruptcy in the above-entitled matter, and answering the petition of W. M. Richardson admits, denies and avers as follows:

I.

Admits that the petition of the bankrupt above named was filed in this court on the 20th day of September, 1909, and thereafter on said day said George M. Ikeda was duly adjudged a bankrupt.

II.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 2 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 2 of said petition.

III.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 3 of the petition above referred to, and [6] therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 3 of said petition.

IV.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 4 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 4 of said petition.

V.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 5 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 5 of said petition.

VI.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 6 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 6 of said petition.

VII.

Admits that on the 5th day of October, 1909, said M. N. Williamson was duly elected trustee in said matter, and on the 14th day of October, 1909, he duly qualified as such trustee, and ever since has been and now is the duly qualified and acting trustee in the above matter.

Denies that said trustee thereupon took possession of said 357 bales of hops, and ever since has been and

now is in the possession of and in that connection avers that he received [7] possession of said hops from C. T. Elliott, United States Marshal, receiver in the above-entitled action, by delivery of warehouse receipts covering said hops on or about the 26th day of October, 1909.

VIII.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 9 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 9 of said petition.

WHEREFORE, respondent prays that the prayer of said petition be denied and that he have such other relief in the premises as to this Court may seem meet and proper.

M. N. WILLIAMSON.

State of California,

County of Sacramento,—ss.

M. N. Williamson, being duly sworn, deposes and says that he is the respondent in the above-entitled proceeding; that he has read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to those matters he believes it to be true.

M. N. WILLIAMSON.

Subscribed and sworn to before me this 4th day of November, 1909.

[Seal]

C. H. S. BIDWELL,

Notary Public in and for the County of Sacramento,
State of California.” [8]

The matter came on for hearing before the undersigned Referee in Bankruptcy on the 17th day of December, 1909, without previous reference to him by order of Court. Evidence was adduced by said W. M. Richardson in support of the above petition and by M. N. Williamson, as trustee in bankruptcy, in opposition to said petition.

From the evidence it appears:

1. That claimant Richardson bases his claim to the hops upon a contract dated March 3d, 1909; said contract is in the words and figures following, to wit:

“THIS AGREEMENT, made this 3d day of March, 1909, between GEORGE M. IKEDA of the County of Sacramento, State of California, the party of the first part, and W. M. RICHARDSON of Santa Rosa, State of California, the party of the second part,

WITNESSETH: That the party of the first part hereby covenants and agrees to deliver to the party of the second part Eighty Thousand pounds (80,000) pounds net of hops grown during the year 1909, and the product of that certain piece or parcel of land situate in said County of Sutter, State of California, and particularly described as follows; to wit—

Consisting of about Sixty-five (65) acres commonly known as the Rideout Ranch, and leased by George M. Ikeda.

The said hops are to be delivered, as aforesaid, in sound condition, good color, fully matured, cleanly picked, well dried, and cured and put up in good merchantable order and condition in bales weighing about one hundred and eighty-five pounds each (five pounds tare per bale to be allowed).

Said hops are to be delivered at the Station at the Rideout Ranch R. R. Depot in the City of ———, not later than the 1st day of October, 1909, and at the time of delivery must be free and clear of all liens, and encumbrances of every kind, [9] including labor employed in their harvest and preparation for market.

Said first party further agrees that at least ten (10) days before he is ready to deliver said hops he will give to said second party notice in writing of the time when such delivery will be made by mailing in the U. S. Mails to said agent of said second party, at said City of Santa Rosa such written notice addressed to said second party or his agent at Santa Rosa, California. And when said hops are so tendered for delivery they may be inspected by said second party or agent. Said second party or agent shall also at any given time after the execution of this agreement have full and free access to and upon said described premises and shall also have the privilege of obtaining samples of said hops ten days before said hops are to be delivered.

In consideration of the covenants of the first party herein contained the said second party agrees to pay to said first party for said hops that are up to the requirements of this contract the sum of (8¢) Eight

cents per pound upon the delivery thereof. And should there be a dispute or difference of opinion between the party of the first part, and the party of the second part, as to whether said hops are up to the requirements of this contract, such difference shall be decided by two competent persons, one selected by the party of the first part, and one selected by the party of the second part, with power to choose an umpire if they do not agree, and their decision shall be conclusive and final.

Such arbitrators shall be men experienced in the cultivation and curing of hops in California.

And to enable said first party to cultivate, harvest and prepare said hops for delivery, as aforesaid, said second party [10] further agrees to advance to said first party during the year of this contract, if said first party so requests, the following sums of money, to wit: \$500.00 on the 4th day of March, 1909, for cultivating purposes; \$900.00 on the 1st day of April, \$400.00 1st day of May, \$400.00 on the 1st day of June, \$400.00 1st July, and balance \$1,400.00 for picking 15th day of August.

All of said moneys so advanced shall, at the time of the delivery of said hops, constitute and be deemed as part payment upon the purchase price thereof.

And said sums of money so advanced as aforesaid, shall bear interest from the date when the same are made, and up to the time of delivery of said hops upon which such advances are made, at the rate of 6% per annum. Provided, that in the event that said hops are not delivered in accordance with the provisions of this contract, then such advances shall

be repayable by the said first party to said party at the time when such delivery should have been made, and the repayment of such sums and all other obligations of said first party under this contract are secured by a mortgage lien in favor of said second party upon said hops; and this instrument shall and does constitute such mortgage upon said hops in favor of said second party, for the purposes aforesaid, and shall stand as such mortgage and as a contract for the sale of such portion of said hops as are necessary to reimburse said second party for all sums of money so due to said second party under this contract. If, however, during the year of this contract, the growing crops herein referred to are not in such conditions at the proper season to produce the quantity and quality of hops above specified and agreed upon, then said second party may give notice in writing to said first party that he will not make any advances or further advances to said first party, and in such event said [11] party shall be discharged from any obligation to make any advance of any money, and if any advances have been made, the same shall be repayable when the above facts are ascertained.

And should there be a dispute or difference of opinion between the party of the first part and the party of the second part, as to whether the growing crops herein referred to are not in such condition at the proper season to produce the quantity and quality of hops above specified and agreed upon, such difference shall be decided by two competent persons, one selected by the party of the first part, and one selected

by the party of the second part, with power to choose an umpire if they do not agree, and their decision shall be conclusive and final. Such arbitrators shall be men experienced in the cultivation, growing and curing of hops in California.

Said first party further agrees to keep insured with good and solvent Insurance Companies of well established reputation for solvency his hop houses on said premises, or said hops, such insurance to be in the name and favor of the party of the second part to cover in full all advances immediately when made by the party of the second part to the party of the first part. And if said first party fails or neglects such insurance as aforesaid, then said second party may procure the same and advance any premiums necessary to be paid, which advances shall be repayable to said second party by said first party, and shall bear interest at the rate of 6 per cent per annum. And in the event of loss by fire of said hop houses, or said hops, said second party shall have the right to collect from the said Insurance Companies having the risks, such amounts as may then be due from said first party, to said second party, by reason of any advances made under this contract, and said first party hereby constitutes said second party his agent for such purposes. [12]

All moneys payable hereunder shall be payable in United States Gold Coin, or its equivalent.

IN WITNESS WHEREOF, the said parties hereunto have hereto set their hands and seals the day

and year first above written.

GEO. M. IKEDA. [Seal]

W. M. RICHARDSON. [Seal]

WITNESS:

OTTO J. KOCH.

State of California,

County of Sacramento,—ss.

George M. Ikeda the Mortgagor in the foregoing Mortgage named, being duly sworn, for himself doth depose and say: That the aforesaid mortgage is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

GEORGE M. IKEDA.

Subscribed and sworn to before me this 3d day of March, 1909, at Sacramento, County of Sacramento.

[Seal]

CHARLES O. BUSICK,

Notary Public.

State of California,

County of Sacramento,—ss.

On this 3d day of March in the year 1909, before me, Charles O. Busick, a Notary Public, in and for said County of Sacramento, duly commissioned and sworn, personally appeared Geo. M. Ikeda and W. M. Richardson known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

CHARLES O. BUSICK,

Notary Public in and for the County of Sacramento,
State of California.” [13]

2. That in pursuance to the contract above set forth Richardson advanced sums of money therein

set forth to Ikeda, and that from time to time his representative visited the Rideout Ranch and inspected the growing of the crops, and the methods of farming employed.

The evidence further shows that all the money agreed to be paid for the hops has never been paid, but that after the adjudication in bankruptcy a tender as to what Richardson claims is still due on the hops was made, but refused.

3. The evidence of Otto J. Koch, principal witness of claimant Richardson shows that on the 28th day of August, 1909, Mr. Koch and Mr. Richardson went up to the ranch of George M. Ikeda. At that time there were 216 bales of hops. The remainder of the crop consisting of 141 bales was in various stages of cultivation. Some of the hops were unpicked and still growing; others were uncured.

Richardson and Koch made an inspection of the hops which were then in the bale and branded some of them with the names of Charles H. May & Company.

4. At three o'clock in the afternoon of said 28th day of August, 1909, Richardson and his agent, Koch, left the Rideout Ranch. It was the understanding at that time that they should return on the following Monday, and that some of the bales of hops at that time should be hauled to the Rideout Station by Ikeda.

5. Just before leaving the Rideout Ranch, certain employees of Ikeda were left in charge of the hops. Mr. Koch testified that Mr. Richardson asked Mr. Dent to look out for the hops.

Mr. Koch testified on this subject:

“Q. But he (Mr. Dent) was a workman employed for Mr. [14] Ikeda? A. Yes, sir.

Q. White man?

A. Yes, sir; he was going to quit up there.

Q. Yes, but he was an employee of Mr. Ikeda, was he not? A. Yes, sir.

Q. Did you pay him anything?

A. Paid him for Mr. Ikeda, yes, sir.

Q. No, but did you pay him anything to see after your interest? A. Did I pay him anything?

Q. Yes, sir. A. No, sir, I did not.

Q. Did Mr. Richardson pay him anything?

A. I couldn't say; I don't think he did.

Q. He was simply one of Mr. Ikeda's employees, was he not? A. Yes, sir.”

Further testimony of Mr. Koch:

“Q. When you and Mr. Richardson went over, your intention was to inspect the hops as you have testified, and then go back on Monday and haul them from the ranch to the depot; is that right?

A. Well, we never,—

Q. Interrupting: Have them hauled?

A. Yes, sir,—well, we won't haul them. It is the grower's place to haul the hops.

Q. Well, I do not care about that. Right there, when you and Mr. Richardson were there on Saturday, August 28th, you went through this process of examining and inspecting the hops?

A. Yes, sir. [15]

Q. And after you got on the ranch, it was the intention of yourself and Mr. Richardson to go back

on the place Monday or Tuesday to look after the hops? A. No, not on Mr. Richardson's.

Q. On your part? A. On my part, yes, sir.

Q. As a representative of Mr. Richardson; you were not going for yourself?

A. No, no; Mr. Richardson.

Q. Then, you state that conversation took place on the ranch when Mr. Ikeda said he would haul the hops? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And then, you intended to,—did you intend to come back, then, on Monday, or not?

A. I was going to come back, yes, on Monday."

6. On the 30th of August, 1909, the hops were attached by creditors of Ikeda, prior to the return of any agent of Richardson to haul the hops from the ranch.

7. The hops remained under attachment until the 22d day of September, 1909, when they were released by the sheriff.

Further testimony of Koch:

"Q. (By Judge McLaughlin.) Now, the hops remained under attachment until when?

A. September 22d.

Q. September 22d? A. Yes, sir."

8. On the 20th day of September, 1909, Ikeda was adjudged a bankrupt by the United States District Court. [16]

9. On September 23d, 1909, after adjudication in bankruptcy, Koch, as agent of Richardson, went up to the ranch of Ikeda, seized all the hops then upon the premises, amounting at that time to 357 bales, and

attempted to haul them to the Rideout Station, and ship them out of the State. Before this could be done, however, they were seized by the United States Marshal, acting under orders of the United States Court; subsequently, they were turned over to the Trustee in Bankruptcy.

10. While the contract on which claimant bases his claim above set forth reports in some respect to be a chattel mortgage, it fails to contain the proper affidavit, as required by the Statutes of California, and counsel, therefore, bases his right to the hops, not by reason of any purported lien created by this contract as a mortgage, but by reason of the alleged delivery of the hops, in accordance with the contract.

After careful consideration of all the testimony in the case and a careful consideration of the elaborate briefs filed by attorneys for claimant and of the trustee, I am of the opinion that:

I.

That said *R. M. Richardson* is not now, and never has been, the owner of all or any of the 357 bales of hops prayed for in his petition, and he has never been the owner or entitled to the possession of all or any of said hops, and that he has at no time had any right, title or interest in, or to any of said hops, but that said bales of hops, and each and every one of them, up to the adjudication of bankruptcy of the above-named *George M. Ikeda*, were the property of said *George M. Ikeda*, and that subsequent to the adjudication of said *George M. Ikeda* in bankruptcy, and up to the time when said hops were heretofore sold under the order of this Court, said bales of [17]

hops, and each and every one of them, were the sole and exclusive property of the above-named bankrupt's estate, and all the right, title and interest to and in said hops, and each and every bale of them, belonged to said estate and the trustee in bankruptcy, M. N. Williamson, as trustee of said estate, was lawfully entitled to the sole and exclusive possession of them and each of them.

The referee further finds that the trustee of the above-named bankrupt does not now have, and never has had, in his possession or control as such trustee, any property or hops of said claimant Richardson, and that said Richardson does not now have, and never has had, any right, title or interest to or in any property or hops in possession or control of the trustee of the above-named bankrupt.

The referee further finds that the proceeds derived from the sale heretofore made of 357 bales of hops in possession of the trustee of the above-named bankrupt belongs to and is the exclusive property of the above-named bankrupt estate, and that said claimant, *R. M. Richardson*, does not now have, and never had, any property right, or any right, title or interest whatsoever to or in said proceeds or any portion thereof.

II.

The referee finds that the allegation in said claimant's, Richardson, petition that 216 bales of hops were accepted on the 28th day of August, 1909, by said *R. M. Richardson* is untrue, and in this connection referee finds that at no time were any hops accepted by said claimant, *R. M. Richardson*, and

referee further finds that possession of all the hops grown on said "Rideout Ranch," to wit, 357 bales, remained in the complete and exclusive possession of said George M. Ikeda up to the 30th day of August, 1909, on which day said 357 bales of hops were attached [18] by certain creditors of George M. Ikeda; that from the 30th day of August, 1909, until the 22d day of September, 1909, said 357 bales of hops were in the possession of the sheriff of Sutter County under said attachment; that on the 20th day of September, 1909, said George M. Ikeda was duly and regularly adjudicated a bankrupt by the above-named court, and at said time M. N. Williamson was appointed receiver to take possession of said hops as property of the bankrupt's estate; that on the 23d day of September, 1909, and subsequent to the adjudication in bankruptcy of George M. Ikeda and the appointment of M. N. Williamson as receiver to take possession of the property of said bankrupt, said hops were seized wrongfully and without right by said claimant, R. M. Richardson, and hauled to the railroad station at Chandler, Sutter County, California; that subsequent thereto, and on the 23d day of September, 1909, an order of the above-named court was made substituting United States Marshal C. A. Elliott, as receiver of said bankrupt's property, in place of M. N. Williamson, and that thereupon said United States Marshal went to Chandler Station and took possession of said hops; that on the 5th day of October, 1909, said M. N. Williamson was duly elected trustee of the above-named bankrupt, and he duly qualified as such

trustee, and ever since has been, and now is, the duly elected, qualified and acting trustee of said bankrupt, and that thereupon he took possession of said 357 bales of hops and remained in possession of the same until said hops were sold by decree of this Honorable Court.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, referee finds that the prayer of claimant's petition for the possession and return of said 357 bales of hops should be denied, and that [19] said claimant, *R. M. Richardson*, has no right, title or interest to or in any of said hops; that he has no right to any money arising from the sale thereof, and that said 357 bales of hops at the time of the sale thereof, by order of this Court, were the exclusive property of the above-named bankrupt's estate, and that the money derived from the sale thereof is now the property of said estate.

Dated April 5, 1912.

J. F. PULLEN,

Referee in Bankruptcy in and for the Counties of
Sacramento, Yolo, Amador and El Dorado.

[Endorsed]: At 10 o'clock and 3 min. A. M.
Filed May 16, 1912. Jas. P. Brown, Clerk. By
Francis Krull, Deputy Clerk. [20]

Exhibit "B."

*In the District Court of the United States in and for
the Northern District of California.*

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Petition for Review of Referee's Order.

To J. F. PULLEN, Esq., Referee in Bankruptcy:

The petition of W. M. Richardson respectfully shows that your petitioner heretofore filed herein a petition to have certain personal property, to wit, 357 bales of hops claimed by the trustee of said bankrupt and delivered by the U. S. Marshal to said trustee, delivered to claimant on the ground that title to said hops had passed to claimant prior to the adjudication in bankruptcy.

That thereafter a hearing of said petition was had after due and legal notice thereof and oral and documentary evidence introduced at said hearing; that thereupon said matter and said petition was taken under advisement.

That thereafter and on the —— day of April, 1912, an order was made by said J. F. Pullen, as such referee, which said order was made and entered herein denying the right of your petitioner as such claimant to said 357 bales of hops and to any part thereof; that such order was and is unsupported by the evidence introduced at said hearing and is contrary to law in this, to wit:

I.

That title had passed to your petitioner of such portion of said hops as had been accepted and branded by your petitioner prior to the filing of the

petition in bankruptcy [21] herein.

II.

The petitioner is entitled to recover of the bankrupt and of his trustees in bankruptcy such portion of said hops as had been actually paid for by petitioner according to the terms of the contract entered into between the petitioner and said bankrupt prior to the filing of said bankrupt's petition to be adjudicated a bankrupt.

III.

That said petitioner is entitled to such portion of said hops as had not been paid for as aforesaid on tendering to the trustee in bankruptcy the balance due thereon under the terms of said contract.

WHEREFORE your petitioner prays that said order may be reviewed as provided in General Order in Bankruptcy No. 27.

Dated April 22d, 1912.

WHITE, MILLER & McLAUGHLIN. [22]

State of California,
County of Sacramento,—ss.

Irving Needham, being duly sworn, deposes and says that he is one of the attorneys for petitioner and claimant in the above-entitled proceedings, and as such attorney is familiar with the facts above set forth; that said petitioner and claimant is not a resident of the county of Sacramento, where affiant has his offices and said petitioner and claimant is now absent from said county of Sacramento; that affiant makes this affidavit for and on behalf of said petitioner, and makes solemn oath that the state-

ment of facts in the foregoing petition contained are true according to the best of his knowledge, information and belief.

IRVING NEEDHAM.

Subscribed and sworn to before me this 23d day of April, 1912.

[Seal]

IDA B. STOCKER,

Notary Public in and for the County of Sacramento,
State of California.

Receipt of copy admitted this 23d day of April, 1912.

DEVLIN & DEVLIN,

Attorneys for Trustee.

[Endorsed]: Filed April 23d, 1912, at 4:30 P. M.
J. F. Pullen, Referee. [23]

Exhibit "C."

[Memorandum Opinion.]

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 6307.

In the Matter of GEO. M. IKEDA,

In Bankruptcy.

This is a petition to review an order made by the referee which determined that the title of 357 bales of hops was in the trustee of the estate in bankruptcy, and denied the petition of the claimant, W. M. Richardson, for an order directing the trustee to restore to him the possession thereof.

Upon consideration of the evidence and the elaborate briefs filed by the attorneys for the respective

parties, my conclusion is that the legal title to 216 bales of the hops in controversy was vested in the claimant Richardson on August 28th, 1909, and that he was the owner thereof at the date of the adjudication in bankruptcy, and that the title to the remaining 141 bales is in the trustee.

The order of the referee is reversed as to the 216 bales of hops, owned by the petitioner, and affirmed as to the remaining 141 bales.

Dated June 13th, 1912.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Jun. 13, 1912, at 9 o'clock and 50 minutes A. M. Jas. P. Brown, Clerk. By Francis Krull. [24]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 13th day of June, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

#6307.

In re GEO. M. IKEDA,

In Bankruptcy.

[Order Reversing Order of Referee in Bankruptcy.]

The petition for a review of the order of the referee made herein having been heretofore submitted to the Court for decision, now, after due consideration had, the Court files its written memo-

randum, and by the Court ordered that said order be, and the same is hereby, reversed as to the 216 bales of hops owned by the petitioner and affirmed as to the remaining 141 bales. [25]

In the District Court of the United States in and for the Northern District of California, First Division.

No. 6307.

In the Matter of GEORGE M. IKEDA,

In Bankruptcy.

Clerk's Certificate to Transcript of Record.

United States of America,

Northern District of California,—ss.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing twenty-five (25) typewritten pages, numbered from 1 to 25, inclusive, to be a full, true and correct copy of the Record and Proceedings in the above and therein entitled cause as is called for by the praecipe of the attorneys for M. N. Williamson, petitioner in the above-entitled cause, as the same remain of record and on file in the office of the Clerk of said Court; and that the same constitute the record on Petition for Revision herein from the order dated June 13, 1912, of the District Court of the United States for the Northern District of California, First Division, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that the cost of preparing the foregoing record on appeal is the sum of \$13.90 and that

the said sum has been paid to me by Devlin & Devlin, Esqrs., attorneys for M. N. Williamson, petitioner herein. [26]

In testimony whereof, I have hereunto set my hand and affixed the seal of the said District Court this 12th day of December, 1912.

[Seal]

WALTER B. MALING.

Clerk. [27]

[Endorsed]: No. 2207. United States Circuit Court of Appeals for the Ninth Circuit. M. N. Williamson, Trustee in Bankruptcy of the Estate of George M. Ikeda, Bankrupt, Petitioner, vs. W. M. Richardson, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Northern District of California, First Division.

Filed December 12, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2207

UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

M. N. WILLIAMSON, Trustee in Bankruptcy of the
Estate of George M. Ikeda, Bankrupt,
Petitioner.

vs.

W. M. RICHARDSON,
Respondent.

Petitioner's Points and Authorities.

The proceeding before the Court is a petition under Section 24b of the Bankruptcy Act to revise, in matter of law, an order of the United States District Court for the Northern District of California, First Division, reversing in part an order and judgment of the referee in bankruptcy, adjudging certain personal property to be vested in the trustee of the estate of the bankrupt.

STATEMENT OF THE CASE.

George M. Ikeda was adjudicated a bankrupt on the 20th day of September, 1909. M. N. Williamson was appointed receiver and subsequently elected trustee of the estate of the bankrupt.

At the time of the adjudication the bankrupt was engaged in the business of raising hops in the County

of Sutter, State of California, and at that time some 357 bales of hops had been cured, remaining still on the place, some were in the process of curing and some remained on the vines unpicked.

A short time prior to the adjudication of bankruptcy, several attachments had been levied on the hops, and these were not released until after the adjudication.

The 357 bales of hops subsequently came into the hands of the trustee, and the controversy now before the Court is in regard to these 357 bales.

Richardson, claiming to be the owner of the 357 bales of hops, filed a petition before the referee praying an order that the trustee be directed to turn them over to him. After a hearing the referee decided that the trustee had the title to the whole 357 bales and denied the petition. The petitioner, Richardson, prayed a review of the finding of the referee by the District Court, and, after a hearing, his Honor, Judge De Haven, reversed the order of the referee as to 216 bales of the hops and affirmed it as to the balance; that is, he found Richardson was entitled to 216 bales and the trustee the balance. We regret that Judge De Haven did not write an opinion. He merely made a memorandum or minute order.

SPECIFICATION OF ERRORS RELIED UPON.

Your petitioner most respectfully contends and submits that taking the record and the testimony and placing any possible construction thereon, that

most unfavorable to him, the order of the District Court is erroneous as a matter of law in that:

I.

Your petitioner, as trustee of the estate of George M. Ikeda, a bankrupt, was at all times since his election and qualification as such trustee, and is now entitled to the possession, and held and holds the title to all of the said 357 bales of hops, as a matter of law.

II.

That the legal title to and right of possession of all of the said 357 bales of hops was in the said George M. Ikeda at the time he was adjudicated a bankrupt, and hence vested in your petitioner as trustee of the estate of the said bankrupt, as a matter of law.

III.

That the evidence shows, as a matter of law, that no part of the said 357 bales of hops was ever delivered to the said claimant, Richardson, prior to the adjudication of the bankruptcy of Ikeda.

IV.

That under the statutes of the State of California the said claimant Richardson is, as a matter of law, without right to assert title to the said 357 bales of hops, or to 216 bales thereof, or to any part thereof.

ARGUMENT, POINTS AND AUTHORITIES.

The respondent, Richardson, bases his claim upon an agreement between himself and the bankrupt, made March 3d, 1909 (set out in full at pp. 13-18 of the petition for revision), whereby the bankrupt agrees *to deliver* to Richardson 80,000 pounds of hops *to be grown during the year 1909*, at the Rideout Ranch R. R. depot. Richardson is given right of inspection, and if hops are up to standard, is to pay Ikeda (the bankrupt) eight cents per pound *upon delivery*. Richardson agreed to make various advances as the season progressed, which were to bear interest at 6 per cent and be considered as part payment for the hops in case of their acceptance, but if the hops were not accepted to be repayable with interest to Richardson.

Richardson did advance certain moneys, but had not paid all due for the hops at the time of the adjudication (pp. 18-19).

On August 28th, 1909, Richardson and his agent visited the ranch, inspected the hops and marked or branded 216 bales "Charles H. May & Company" (p. 19), and agreed to return and take those hops on the following Monday (p. 19). The 216 bales remained in the possession of Ikeda the same as before the branding, nothing else being done towards Richardson's taking possession (pp. 19-21).

Prior to the return of Richardson's agent, to-wit, on August 30th, 1909, the hops, including the 216 bales, were attached by the Sheriff of Sutter County,

and remained under attachment until after the adjudication of bankruptcy.

The respondent claims that as matter of law the foregoing transactions vested him with the title and right of possession of all the hops, and the District Court held they invested him with the title and right of possession of the 216 bales branded. Your petitioner claims the contrary, and that is the question now before this Court.

THE TITLE TO THE HOPS VESTED IN THE TRUSTEE.

The agreement between Richardson and Ikeda was simply an executory agreement to sell hops at some future time. It contemplated a delivery subsequent to the time they should be grown, cured and baled.

Richardson *agrees to pay upon delivery*. He has a right of rejection. Delivery is to be made at the railroad station. The moneys Richardson advanced were *at the time of the delivery of said hops* to be deemed part payment of the purchase price. If the hops were not delivered Richardson was to be repaid the advances with interest.

Did this agreement and the subsequent advances constitute a sale of the hops? Was it sufficient to vest in Richardson the title to or right of possession of the hops when grown, cured and baled? The answer to these questions must be found in the laws of California.

Manifestly under the Code provisions, and the cases cited in support thereof, such a contract creates only an agreement to sell, and does not transfer possession or a right to possession of the property after it shall come into existence.

Section 1661 of the California Civil Code provides :

“An executed contract is one, the subject of which is fully performed. All other are executory.”

Section 1721 of the Civil Code provides :

“Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property.”

Section 1726 of the Civil Code provides :

“An agreement for sale is either: 1. An agreement to sell; 2. An agreement to buy; or 3. A mutual agreement to sell and buy.”

Section 1727 of the Civil Code provides :

“An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.”

Section 1728 of the Civil Code provides :

“An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing.”

Section 1729 of the Civil Code provides :

“An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.”

Section 1730 of the Civil Code provides :

“Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not.”

Under this Section, it is clear that property not in existence cannot be *sold*, but only the subject of *an agreement to sell*.

Section 1141 of the Civil Code provides :

“Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, in the manner prescribed by the chapter upon offer of performance.”

Section 1722 of the Civil Code provides :

“The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer.”

Under this section, of course, the hops here in controversy could not be the subject matter of sale, as they were not in existence when the contract was made.

Under the above cited provisions, the contract in

question is merely an executory contract; an agreement to sell hops. It is not an executed contract; it is not a sale.

The relation of the parties, created by the agreement was then: (1) That of prospective buyer and seller; (2) That of debtor and creditor. Under neither of these relations did the respondent obtain either title to, or the right of possession of, the hops.

A MERE EXECUTORY AGREEMENT.

The contract being merely an executory agreement for the purchase and sale of personal property, the prospective purchaser obtains no title until possession has actually been taken by him, and especially so in the case of property not yet *in esse*. He acquires no lien on any specific property; the relation is purely contractual.

Gibbs v. Rainard, 86 Cal., 532;

Beauchamp v. Archer, 58 Cal., 431;

Cardinell v. Bennett, 52 Cal., 476;

McLaughlin v. Pactte, 27 Cal., 451.

In *Williston on Sales* the exact question here involved, and the exact contention made by the respondent, is discussed clearly, logically, conclusively and forcibly at pages 170, 171 and 172. The subject is so clear with especial reference to cases in which the prospective seller has become bankrupt, that we feel justified in asking a reading of it in full. It is directly in line with and amply sustains the petitioner's views.

THE CONTRACT DID NOT CREATE A LIEN.

In the lower court it was contended that the contract between Ikeda and Richardson created an equitable lien in favor of the latter. We submit no lien was created, but even if such be the case, the lien would be but for the amount advanced, and would carry with it no right of possession.

*THE CHARACTER OF THE CONTRACT.
DELIVERY ESSENTIAL TO TITLE.*

There was never any delivery of the hops to the respondent Richardson. There is no evidence whatsoever to sustain any contention as to a delivery of the 141 bales which, in connection with the 216 bales hereinbefore considered, made up the 357 bales. The referee and the District Court so found, and, therefore, attention must be given solely to the said 216 bales.

Contracts such as the one under discussion here may assume two phases: (1) An agreement to sell all of a certain class of goods *when they come into existence*, or (2) an agreement to sell certain goods when they come into existence *when certain things are done after they come into existence*.

The contract in question here is manifestly of the second class; the hops were to be paid for upon delivery after Ikeda had baled and hauled them to the Rideout railroad station, but even if the agreement be of the first class the respondent can not recover; he was not entitled to the hops.

The inspection was made and the 216 bales marked on August 28th, 1909. At that time all the hops contracted for had not been baled, some 141 bales were still in the process of being cured. The agreement was entire and called for 80,000 pounds.

Where an agreement is made to sell goods not in existence, the title does not pass to each particular piece or lot as it comes into existence, but remains in the vendor *until all of the goods to be sold have been completed and delivered*. Thus, a contract for the building of a vessel or other thing not yet *in esse* does not vest any property in the party for whom it is to be constructed or prepared until the entire vessel or other thing is completed and delivered.

Pittsburg, etc., R. Co. v. Heck, 50 Ind., 308;

Low v. Austin, 20 N. Y., 182;

McConibe v. New York & E. R. Co., 20 N. Y., 497;

People, ex rel. Pacific Mail S. S. Co. v. Com's of Taxes, 58 N. Y., 247;

Halterline v. Rice, 62 Barb., 600;

Happy v. Mosher, 47 Barb., 503;

Dyckman v. Valiente, 43 Barb., 142;

Lyman v. Becannow, 29 Mich., 471;

Haney v. Schooner Rosabelle, 20 Wis., 249.

And it makes no difference in the rule that the price is to be paid in installments as the work progresses.

Elliott v. Edwards, 35 N. J. L., 268;

Wright v. Tetlow, 99 Mass., 397.

Or that in addition thereto the construction is under the superintendence of the prospective vendee.

Merritt v. Johnson, 7 Johns, 473, 5 Am. Dec., 289;

Williams v. Jackman, 16 Gray, 514;

Briggs v. A Light Boat, 7 Allen, 287.

Or that there is also a stipulation that the person for whom the thing is constructed shall have a lien for the payments made.

People v. Commissioners of Taxes, 58 N. Y., 242;

Andrews v. Durant, 11 N. Y., 35.

In the case at bar there was no payment made on account of the purchase price; none was contemplated; the money advanced was to remain a *debt*, bearing interest, until the whole 80,000 pounds of hops were delivered, and then, and not until then, was it to be applied upon the purchase price.

The purchase price was not paid and, therefore, no title to the hops passed to the respondent. This is a well settled principle in the law of California, and is well set forth in the case of

Yukon River, etc. Co. v. Gratto, 136 Cal., 538,

Citing,

Clarkson v. Stevens, 106 U. S., 505;

Andrews v. Durant, 11 N. Y., 35,

and approved of in *Benjamin on Sales*, p. 298.

See also:

Hallidie v. Sutter Street R. Co., 63 Cal, 575;

Bacon v. The Poconocket, 67 Fed., 262;

Lang's Appeal, 81 Pa. St., 18;

Coursin's Appeal, 79 Pa. St., 220.

In the foregoing points the agreement between Richardson and Ikeda has been treated as one of the first class (*supra*), one to sell goods *when they come into existence*, but, as matter of fact, it is one of the second class, one to sell goods *after certain things have been done subsequent to their coming into existence*.

As to the 141 bales there is no question. No attempt to deliver them was ever made. Some of them were even unpacked at the time the 216 bales were marked.

The title passes upon delivery. When it passes and when a delivery is had depends upon the intent of the parties.

Gouser v. Smith, 115 Pa., 452;

and the intent is to be gathered from the surrounding circumstances.

Elger Cotton Cases, 89 U. S., 187.

The parties may determine what act shall be done before the title passes.

Malone v. Minn. Stone Co., 36 Minn., 335.

Thus, when the parties fix some time or the doing of some act, at or upon which the title shall pass it does not pass until that time or the doing of that act.

In the case at bar, under the very terms of the agreement, the hops were to be baled *and after inspection delivered by Ikeda at Rideout station, and were to be paid for on delivery.* The intent that the title should then, and not until then, pass is manifest from the agreement itself.

Where the vendor undertakes to deliver goods at a certain place the title does not pass until delivery, and until delivery they are at the risk of the seller.

Taylor v. Cole, 111 Mass., 363;

Alles v. Voigt, 90 Mich., 125;

De Wolf v. New York Firemen's Ins. Co., 20 Johns, 214;

Ludlow v. Brown, 1 Johns 1, 3 Am. Dec., 277;

McNeal v. Braune, 53 N. J. L., 617;

Braddock Glass Co. v. Irwin, 153 Pa., 440;

Sneather v. Grubbs, 88 Pa., 147;

Hooper v. Chicago & N. R. Co., 27 Wis., 81, 9 Am. Rep., 439;

24 Am. and Eng. Enc. Law, p. 1050.

ANY TRANSFER MADE WAS VOID AS TO
CREDITORS OF IKEDA.

The petitioner contends that, even admitting there was a passing of the title to the 216 bales from Ikeda to Richardson, the transfer was void as to

the creditors of Ikeda. There was no such delivery as is required by the law of California.

Our argument so far has been made as if Richardson and Ikeda were the only parties in interest. The petitioner, however, represents the creditors of Ikeda, and as to them the transfer to Richardson was unquestionably void.

Section 3440 of the Civil Code of California, so far as material here, is as follows:

“Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.”

There are cases which hold that, as a general rule, the trustee succeeds only to the interests of the bankrupt, but these cases do not apply where a code provision, such as that above quoted, is involved.

Remington on Bankruptcy, p. 676,

And the petitioner, as trustee, is entitled to invoke that Code provision.

The evidence clearly shows Ikeda and his employees remained in possession of the 216 bales after they were inspected and marked on August 28th, and exercised the same dominion over them that they did prior to that time. There was no change in the position, location or condition of the hops until after the levy of the attachments and the adjudication of bankruptcy (pp. 20-21).

The Supreme Court of California has often construed this section of the Code.

It has been held that the vendee must take *actual* possession, which must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee.

Stevens v. Irwin, 15 Cal., 503, 506.

Possession is not changed within the contemplation of the statute where vendor or his servants remain in possession of the property the same as before the sale.

McKee S. B. Co. v. Martin, 126 Cal., 557;

O'Kane v. Wheelan, 124 Cal., 200;

Murphy v. Mulgrew, 102 Cal., 547;

Etchepare v. Aguirre, 91 Cal., 288;

Bunting v. Saltz, 84 Cal., 168;

Merrill v. Hurlburt, 63 Cal., 494;

Bell vs. McClellan, 67 Cal., 283;
Godchaux v. Mulford, 26 Cal., 316;
Brugert v. Borchert, 59 Mo., 80;
Mills v. Thompson, 72 Mo., 367;
Doack v. Brubacker, 1 Nev., 218;
Moore v. Kelly, 5 Vt., 34, 26 Am. Dec., 282;
Bump on Fraudulent Conveyances (3d ed.),
 171.

The mere marking of goods is of no avail if there is no change of possession.

Stewart v. Nelson, 72 Mo., 522, 524.

The goods must either pass to the vendee or the vendor must pass away from them, leaving them in the exclusive possession of the vendee.

Garman v. Cooper, 72 Pa. St., 32.

The possession of the vendee must be exclusive. A concurrent possession with the vendor is not sufficient.

Wordell v. Smith, 1 Camp., 332;
Allen v. Massey, 17 Wall, 351;
Waller v. Cralle, 8 B. Mon., 11;
Plaisted v. Holmes, 58 N. H., 293;
Babb v. Clemson, 10 Serg. & R., 419; S. C. 13
 Am. Dec., 684;
Brawn v. Keller, 43 Pa. St., 104;
McKibbin v. Martin, 64 Pa. St., 352;
Miller v. Garman, 69 Pa. St., 134;
Worman v. Kramer, 73 Pa. St., 378;

Stiles v. Shumway, 16 Vt., 435;

Hall v. Parsons, 17 Vt., 271.

ANY DELIVERY OF THE HOPS WAS VOID-
ABLE AS A PREFERENCE WITHIN SEC.

60 OF THE BANKRUPTCY ACT.

Under the agreement Ikeda was to pay interest on the money advanced by Richardson, *and at the time of the delivery of the hops*, if they were accepted by Richardson, this money was to be considered part of the purchase price. If they were not accepted Ikeda was bound to repay the money advanced. The acceptance of the hops was optional with Richardson. The relation of Richardson to Ikeda on August 28th, when it is contended by the respondent that a delivery was made, was that of a general creditor. This is not a case where there was a specific lien upon some specific property and something done to enforce that lien within four months. We have shown that prior to August 28th Richardson had no rights in the property itself. There was here at the most an antecedent debt or agreement, and an attempt to transfer the property in satisfaction thereof.

Where property is pledged a few days before the filing of a petition in bankruptcy, though in pursuance of a prior agreement to pledge a preference is created.

In re Sheridan, 96 Fed., 406, 3 Am. Bankr. Rep., 554.

A chattel mortgage given within four months prior to bankruptcy in accordance with a prior promise to give security is a preference.

Pollock v. Jones, 61 C. C. A., 555, 124 Fed., 163.

An agreement made at the time a loan was secured to give the lender security upon property to be purchased will not render valid a trust deed given pursuant thereto within four months of bankruptcy.

In re Dismal Swamp Contracting Co., 135 Fed., 415.

A trust deed cannot be considered as relating back and becoming effective as of the date of a contract to give the same.

Morgan v. First National Bank, 76 C. C. A., 236, 145 Fed., 466.

A mortgage or transfer of property within four months of bankruptcy, which otherwise would constitute a preference, is not deprived of that character by the fact that it was executed in a pursuance of a contract to do so made more than four months prior to the filing of the petition. The theory and purpose of the bankruptcy act are to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy share and share alike among his creditors.

In re Great Western Mfg. Co., 81 C. C. A., 341, 152 Fed. 123;

Vitzthum v. Large, 162 Fed., 685;
In re Mandell, 122 Fed., 127;
Johnson v. Huff, 133 Fed., 704;
In re W. W. Mills Co., 162 Fed., 42;
Torrance v. Bank, 71 Pac. (Kan.), 235;
Bank v. Johnson, 94 N. W. (Neb.), 831.

CONCLUSION.

If we consider the equitable features of this case, it is to be noted that among the creditors of the bankrupt are the laborers whose toil produced the hops. It is the policy of the law of California to give laborers preferred payment for their labor. Richardson, undoubtedly, has a right to share with the general creditors as to the money advanced by him, but he should not under the facts in this case be given all, or the larger part of all the assets, leaving nothing for the other creditors. In law, and in a moral sense, the burden of clearly proving his right to these assets was upon Richardson, and, we submit, this he has not done. To the contrary it clearly appears here, as a matter of law:

That there was no sale of the hops to Richardson.

That Richardson had no lien upon them.

That there was no delivery of the hops to him.

That if there was a sale it was void as to the trustee and as to the creditors of the bankrupt for want of a sufficient delivery, or,

If there was a sale and delivery it was void as a preference under the Bankruptcy Act.

From this it follows that the title to, and right of possession of the hops vested and was in the trustee of the bankrupt, and that the order of the District Court must be reversed and that of the referee sustained.

Respectfully submitted,

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Attorneys for Petitioner.

UNITED STATES
Circuit Court of Appeals
For the Ninth Circuit

M. N. WILLIAMSON, Trustee in Bankruptcy of the Estate of George M. Ikeda, Bankrupt,

Petitioner.

vs.

W. M. RICHARDSON,

Respondent.

Respondent's Points and Authorities

The preliminary hearing of this matter was had before J. F. Pullen, Referee in Bankruptcy, December 17, 1909. On April 5, 1912, said Referee filed his findings and conclusions of the law to the effect that M. N. Williamson, Trustee on Bankruptcy of the Estate of George M. Ikeda, Bankrupt, was entitled to 357 bales of hops in controversy. On April 22, 1912, Respondent Richardson filed his petition for review of the order made by the Referee and on June 13, 1912, his Honor, the late Judge DeHaven, caused to be entered his decision and order as follows:

DECISION.

“This is a petition to review an order made by the Referee which determined that the title

to 357 bales of hops was in the trustee of the estate in bankruptcy and denied the petition of the claimant W. M. Richardson for an order directing the trustee to restore to him the possession thereof.

Upon consideration of the evidence and the elaborate briefs filed by the attorneys for the respective parties my conclusion is that the legal title to 216 bales of the hops in controversy was vested in the claimant Richardson on August 28th, 1909, and that he was the owner thereof at the date of the adjudication in bankruptcy, and that the title to the remaining 141 bales is in the trustee.

The order of the Referee is reversed as to the 216 bales of hops owned by the petitioner and affirmed as to the remaining 141 bales."

ORDER.

"The petition for a review of the order of the Referee made herein having been heretofore submitted to the Court for decision, now, after due consideration had, the Court files its written memorandum, and by the Court ordered that said order be, and the same is hereby, reversed as to the 216 bales of hops owned by the petitioner and affirmed as to the remaining 141 bales."

On December 10, 1912, petition for the revision of the decision of the said order and judgment was filed.

STATEMENT OF THE CASE.

On March 3, 1909, George M. Ikeda and W. M. Richardson entered into a contract, which is set forth on pages 13 to 18 of the Petition for Revision. By the terms of this agreement Ikeda unequivocally agreed to sell and Richardson to buy eighty thousand pounds of hops. The agreement further contained provisions obligating Richardson to advance certain portions of the purchase price on specified dates.

On September 20th, 1909, Ikeda filed his petition in bankruptcy.

On the 28th day of August, Respondent Richardson inspected, segregated and accepted 216 bales of hops which were branded and marked "C. S. May & Co., Albany, New York." C. S. May & Co. were consignees to whom Richardson was shipping said hops. The total weight of the bales so inspected and marked was 42,357 pounds which at the contract price would be worth \$3,388.56. Prior to the time of such acceptance, Richardson had paid on the purchase price \$5,397.75, or about \$202.25 less than the contract price of the whole crop of 357 bales.

The 216 bales of hops were rolled in a pile and Richardson requested a man named Dent, who was upon the premises, to look after and care for them until Monday following when

he would remove the hops to the railroad station.

On August 28th, when 216 bales had been segregated, accepted and marked with address of consignee as aforesaid, Richardson intended to return Monday, August 30th, to remove said hops to the railroad station, but when the agents went there for that purpose, they found that the Sheriff of Sutter County had levied an attachment on the hops and prevented their removal by the agents of Richardson. This attachment prevented the removal of said 216 bales by Richardson and also prevented removal of the remaining 141 bales.

Thereafter and before the 20th day of September, 1909, the total crop of hops amounting to 357 bales was inspected and accepted by Richardson.

On September 23rd, 1909, when Williamson seized the hops they were in the possession of Richardson. The whole 357 bales had been removed to the railroad station, part of them having been loaded on cars. The total weight of the crop of 357 bales of hops would be about 70,000 pounds and Richardson had paid to Ikeda all but \$202.25 of the stipulated purchase price prior to August 28, 1909, and, but for the attachment by the Sheriff, all of the hops would have been removed from the

premises and loaded on the cars long prior to September 20th.

The contract between Ikeda and Richardson was a crop mortgage valid as against Ikeda and all persons in privity with him, being void only as to creditors and subsequent purchasers. Civil Code Cal., Sec. 2957.

ARGUMENT

Status of Trustee in Bankruptcy

The argument of counsel for petitioner is based throughout on the false assumption that the trustee in bankruptcy occupies the same relative position as a creditor or bona fide purchaser. The trustee in bankruptcy STANDS IN THE SHOES OF THE BANKRUPT and can assert no right nor interpose any defence which would not be available to the bankrupt himself. In a carefully considered case involving claim that the trustee was entitled to all property which could be levied upon or sold under judicial process against the bankrupt.

It was said:

“In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under judicial process against the bankrupt, either generally, or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But

this assumption is not warranted. The goods delivered by the contractor upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties to the contract. * * * The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt, to personal property so situated, will be subject to all legal and equitable claims of others, which exist against the bankrupt, not in fraud of the bankrupt law or the rights of general creditors."

Dunlap Silk Co. vs. Spencer, 115 Fed. Rep. 695.

In another case it was held:

"That bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the Court or the Trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the Courts either of common law or chancery. * * * It is so sweeping that, in actions at law brought by assignees in bankruptcy, defendants may prevail on merely equitable defence."

In Re Chase, 124 Fe. Rep. 753.

In the case at bar, the respondent, Richardson, unquestionably had a LIEN ON ALL OF THE HOPS BY VIRTUE OF THE CONTRACT ENTERED INTO BETWEEN THE BANKRUPT AND HIMSELF. The chattel mortgage was not executed in the manner required by law to make it effective against creditors and bona fide purchasers, BUT IT WAS A VALID AND BINDING LIEN AS BETWEEN IKEDA AND WILLIAMSON. This lien affected all of the hops up to the moment of delivery.

Civil Code California, 2957.

Williamson had accepted, marked and segregated 216 bales of the hops and but for the attachment would have removed all of the hops from the premises of Ikeda long before the petition in bankruptcy was filed. The Trustee in Bankruptcy therefore took the hops subject to the general lien of Williamson on all of the 357 bales and to his title based on possession of 216 bales before the attachment was levied.

“Under the bankruptcy act, when a debtor is adjudged a bankrupt, his entire estate, so far as it is not exempt, is in legal contemplation as effectually brought into custodia legis and appropriated to the payment of his debts as if it were taken in execution or attachment, subject only to the qualification

that, where the act does not specially provide otherwise, as it does in respect of cases affected by fraud, the estate is brought into custodia legis and appropriated *in the same plight and condition that the bankrupt himself held it*, and subject to all the equities imposed upon it in his hands. * * * *

but the qualification does not consist in giving effect to proprietary acts of the bankrupt committed after the sequestration of his property, but only to such as were committed prior to the filing of the petition and gave rise to rights in third persons which were valid as between themselves and the bankrupt, and which they were lawfully entitled to assert when the Trustee's title accrued, the ruling, as qualified, being that *the Trustee, in cases unaffected by fraud, takes the property in the same plight and condition that the bankrupt held it*, and therefore subject to the rights of such third persons, *although a creditor levying an execution or attachment thereon would take it discharged of such rights."*

In Re Youngstrom, 153 Fed. Rep. 104.

Security W. Co. vs. Hand, 19 A. B. R. 295.

Hewitt vs. Berlin, 194 U. S. 296.

Humphrey vs. Tatman, 198 U. S. 91.

York vs. Cassell, 201 U. S. 344.

That the Trustee is not a bona fide purchaser for value is established by

Hewitt vs. Berlin, 194 U. S. 296.

Thompson vs. Fairbank, 196 U. S. 516.

Stewart vs. Platt, 101 U. S. 739.

The Trustee takes no title and has no right which the bankrupt could not assert; in fact he takes only such title as the bankrupt could have transferred *without consideration*.

In Re Dunlop, 19 A. B. R. 368.

Adams vs. Collier, 122 U. S. 382.

Yeatman vs. Savings Inst., 95 U. S. 764.

Gibson vs. Warden, 14 Wall 244.

Cook vs. Tullis, 18 Wall 332.

Mitchell vs. Winslow, 2 Story 630.

Brown vs. Heathcote, 1 Atk. 160.

In *Security Co vs. Hand*, 19 A. B. R. 295, the Court lays down the rule in the following terse language:

“It is no new doctrine that the assignee or Trustee in Bankruptcy stands in the shoes of the bankrupt and that the property in his hands, unless otherwise provided in the Bankruptcy Act, is subject to all the equities imposed upon it in the hands of the bankrupt. This has been the rule under former rules and is now the rule.”

Applying the foregoing authorities to the facts in the case at bar, it seems very clear that if there was error in the decision of the lamented DeHaven, it was to the favor of petitioner

instead of to his detriment. As to 216 bales of hops, the possession, and hence the title of Williamson, was certainly good *as against Ikeda*, who submitted the hops for inspection, heard the acceptance and consented to the segregation and marking thereof. The error, if there was such, was in denying Richardson title to **all** of the hops when he had paid all but \$202.25 of the contract price for the whole crop of 357 bales upon which he had a mortgage lien as against Ikeda, and which would all have been removed from the premises in August but for Ikeda's fault in suffering his creditors to levy an attachment.

PASSING OF TITLE.

Counsel for the Trustee contend that the contract between Ikeda and respondent was merely executory. We do not agree with this contention, but if it be granted that the contract at the time of its execution was such, it had been fully executed prior to the petition in bankruptcy especially as to the 216 bales of hops. Moreover from the moment the first advance was made on the purchase price, there was a lien on the entire crop to secure repayment of the money in the event that Ikeda for any reason should not deliver.

The petition in bankruptcy was filed on September 20th. On August 28th, Ikeda being present, the respondent examined and accept-

ed 216 bales of hops which were marked and segregated from the remaining hops. All this was done with Ikeda's consent and constituted valid delivery as between Ikeda and Richardson. Mr. Richardson asked Mr. Dent, one of the men employed by Ikeda, to look after the hops and much is made of this as indicating that Ikeda's possession continued. When Ikeda was informed by Richardson that the hops so segregated were accepted, and when Ikeda stood by and watched the hops branded and marked with the name of consignee, there could no longer be contention by Ikeda that there had not been a delivery to Richardson, and if the employee of the seller was specially requested to care for the property and consented to do so this did not result in possession by the employer, who might himself promise to care for the property without such result. Richardson then and there announced that he would remove the hops to the railway station the following Monday, but when his agents went upon the ground for the purpose of removing the 216 bales of hops and the remainder of the crop as fast as it could be baled and accepted, they found that the Sheriff had attached the hops and thus prevented removal from the premises.

This restraint upon Richardson who desired

to remove the hops, and intended to do so, is an element to be considered in determining the question of possession, for when it is considered that but for such restraint, all of the hops would have been removed from the premises three weeks before the petition was filed, it certainly cannot be said that Ikeda remained in possession. The possession of the Sheriff was the possession of Richardson as to Ikeda and his successor, the Trustee. This restraint upon removal could not operate to the favor of Ikeda whose failure to pay, whether through design or misfortune, could not possibly redound to the detriment of Richardson who stood ready to remove all of the hops. The restraint imposed was therefore subject to the right of Richardson to have the hops removed and shipped to his consignee and the delay cannot result in his spoliation. The law will make this restraint the equivalent of removal of all the hops.

Recurring to the main fact, however, there had unquestionably been delivery of 216 bales of hops prior to the attachment.

“After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a

perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd J. in *Rhose vs. Thwaites*. 'The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes.' "

Benjamin on Sales, (2 Am. Ed.) Sec. 358.

Benjamin on Sales, 2 Amer. Ed. Sec. 358.

The reflections of counsel concerning uncertainty of executory contracts of this character are completely neutralized and destroyed as to the 216 bales by the fact that on the 28th day of August, 1909, the purchaser specifically accepted, segregated and marked said hops, thus removing all uncertainty. The contention that the contract provided that Ikeda should deliver the hops to the station, and there could be no delivery unless this was done, is clearly untenable. Richardson could and did waive the performance of this obligation by accepting, segregating and marking the hops upon the ground.

“But the necessity for performing the condition precedent may be waived by the party in whose favor it is stipu-

lated, either expressly or by the implication resulting from his acts or conduct. This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the other party in fulfilling the condition, or incapacitates himself from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfill the condition. No authority is needed, of course, for the proposition that the party in whose favor the condition has been imposed may expressly waive it."

Benjamin on Sales, page 517.

As far as 216 bales of hops are concerned, Richardson waived the removal of the hops to the railroad by saying through his acts, "I accept and segregate these hops and mark them for shipment to my consignees." Moreover, Ikeda, as to the whole quantity of 357 bales of hops, by failing to pay his creditors prevented the full performance of his contract and neither he nor his successor, the Trustee, can claim benefit, immunity or right because the attachment prevented Richardson from removing the hops to the railroad and thence to C. S. May & Co., consignees.

Counsel seem to contend that possession, and hence title, must be tested by rules which declare what shall constitute possession *as*

against a creditor or an innocent purchaser, but the real test is WHAT WOULD CONSTITUTE POSSESSION AS BETWEEN IKEDA AND RICHARDSON. Section 3440 of the Civil Code of California and authorities thereunder are relied upon as supporting the contention that there was no delivery in this case. It will be observed, however, that this section requires certain acts to render the transfer valid AS AGAINST CREDITORS, but that this does not affect the validity of any delivery consented to or agreed upon as between the parties.

Before proceeding to an examination of the California authorities, we will notice a decision of the Circuit Court of Appeals, which squarely decides the proposition. The issues there were identical with the issues here. The decision reads as follows:

“Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. The particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note. The element necessary to a perfect and complete sale was supplied by the appro-

priation of a particular lot of lumber to the contract. * * * NEITHER DID THE PROVISION THAT THE VENDOR SHOULD DELIVER AT CHICAGO PREVENT THE TITLE FROM PASSING BEFORE SUCH DELIVERY. UNDOUBTEDLY, THE GENERAL RULE IS THAT THE SELLER OBLIGATES HIMSELF AS A PART OF HIS CONTRACT TO DELIVER THE PROPERTY TO THE BUYER AT SOME SPECIFIED PLACE, TITLE WILL NOT PASS UNTIL SUCH DELIVERY. (Citing cases). 'Slight evidence,' says Mr. Benjamin, 'is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances.' Benj. Sales, Sec. 329. Here the lumber cut, inspected and measured was completely identified. *Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer.*"

McElwee vs. Metropolitan L. Co., 69 Fed. 205.

In that case, the seller under the contract was required to deliver the lumber at Chicago,

in this case he was required to deliver the hops at the railroad station. In that case as in this, the property sold was to be produced and inspected and the decision as above indicated was adverse to the contention of the petitioner in the case at bar.

In another case, the bankrupt prior to filing his petition, had entered into a contract to deliver the output of a certain mill. A few days prior to the adjudication in bankruptcy, claimant demanded the lumber which remained in the yards of the bankrupt lumber company. The trustee contended that this was a preference and resisted the defendant's proof of an additional claim unless it surrendered this lumber; but the court said:

“There was no suggestion that the contract made between the Lumber Company and Franklin for the purchase of the entire output of Franklin's mills was not a fair one and one that the law would enforce. The contract was still existing at the time of the adjudication and whatever lumber was on hand as the produce of the mill the Lumber Company had a right to claim, provided it complied with the terms which had been agreed upon. If there had been no payment upon the contract of purchase in advance, the Lumber Company would have been entitled to require the Trustee to surrender to it

the lumber produced at the mill, provided it complied with the terms of purchase. *Having advanced money upon the contract of purchase, the Lumber Company thereby became entitled to at least as much of the products of the mill as it had paid for and it could have recovered so much from the Trustee, even after the bankruptcy.* It is our opinion that at most the taking of the \$1000 worth of lumber under a claim by the Lumber Company that it was entitled to that specific property by virtue of the contract of purchase cannot be construed into a payment upon an existing debt such as to constitute a preference under the Bankruptcy Law."

Mills, Trustee vs. Virginia Co., 20 A. B. R.
750

Stelling vs. Jones Lumber Co., 8 A. B. R.
532.

Hanselt vs. Harrison, 105 U. S. 401.

In a case involving questions akin to those involved in this proceeding, the contract provided for the purchase of all the lumber on hand at the seller's mill on the date of the contract and all that the seller should manufacture during six months thereafter. Advance payments of 75% of the value were made under the agreement, but the lumber was piled in the **seller's yards** on the date of his adjudication in bankruptcy. The lumber was

claimed by the Trustee and by the buyer and was awarded to the Trustee by the Bankruptcy Court, but on petition for revision, the Circuit Court of Appeals awarded it to the buyer, saying:

“There was an undisputed agreement for one party to sell and another to buy. The thing was specially designated, described and segregated, the price was fixed, and payments were made as agreed. Although the agreement may have been to some extent executory, it being for the purchase and sale of all lumber of a certain description ‘now on hand at the mill of R. R. Cowan, Cowan, Fla., and all that he will manufacture’ during a specified period, yet when the lumber was manufactured and segregated, and the bills of sale, with full details of description, were presented and accepted, and payments made according to contract, there was a complete sale of the property designated in the bills, and the title thereto at once, vested in Baars & Co., and this notwithstanding, under the contract, it remained with Cowan to deliver the lumber at Pensacola and for Baars & Co. to pay the balance of the price, less railroad freight on delivery. As between Cowan and Baars & Co. there does not seem room for question as to the rights of the parties. Of course, on the matter now before us, the Trustee

of Cowan's estate in bankruptcy stands in Cowan's shoes.

The Trustee, however, contends that in the present case the title did not pass, because the delivery was not made, the lumber had not been inspected, and the insurance clause in the six months' contract indicates that the title was to remain in Cowan. * * * However these details may be, the case is clear as to purchase and sale of the property, and in our opinion, the title fully passed."

Baars vs. Mitchell, 154 Fed. 322.

This decision is very pertinent to the case at bar for it effectually disposes of the contention that delivery was not affected until the hops were at the railroad station. It is contended by counsel that the delivery here essential to passing of title was such delivery as would satisfy the requirements of Section 3440 of the Civil Code of California. It is, however, well settled that such a delivery was good as between parties and against all the world except creditors, would be sufficient.

Williams vs. Borgwardt, 119 Cal. 80.

Here, however, there was a delivery sufficient to meet the **very severe test** of Section 3440.

The object of the statute is to give notoriety to sales, by requiring the owner of personal

property to occupy toward it the same relation, and to exercise over it the same control, which is customary in such transactions and under similar circumstances. When creditors are asserting the invalidity of the transfer on the ground of failure to make delivery the terms of the contract between the buyer and seller do not afford the test as to the passing of title. The terms of the agreement between the parties to the sale, and their intent as to passing of title are absolutely immaterial. The essential requirement as between the buyer and creditors of the seller is that *notoriety* shall be given to the transfer of the property. When this has been done the rules that apply where the question is the determination of the party as between buyer and seller, on whom shall fall the loss occasioned by a destruction of the property, have no applicability. In other words, where there have been acts of such character as to indicate a change of ownership, the statute is satisfied and the terms of the contract between buyer and seller have no bearing on the question. The object of the statute is to give those who have extended credit relying on the possession by their debtor of certain personal property, the right to proceed against such property by attachment.

Now, when it comes to determining what

acts constitute a delivery which will be good against creditors, the circumstances of each case and the character of the property transferred must be taken into consideration. The law does not require the same manual delivery to accompany the sale of a cord of wood, which would be essential to the validity of a sale of a diamond.

Counsel have stated that California cases alone must be looked to to ascertain what constitutes delivery and we will meet them on their chosen ground. The leading case pertinent to the case before us is *Dubois vs. Spinks*, 114 Cal. 292. There the appellants contended that the transfer of certain wood was void as against them for want of an immediate delivery, followed by an actual and continued change of possession, and the Court says:

“What constitutes an immediate delivery, or an actual and continued change of possession, in the sense of Section 3440 of the Civil Code, is a question of fact to be determined on the evidence; and where, as in this case, the evidence tends to prove such delivery and change of possession, the finding of the Court will not be disturbed.”

Proceeding to further consideration of the subject it was further stated:

“Considering the **ponderous and bulky nature** of the one hundred and

twenty-six cords of wood, it was not necessary to change its situation for the purpose of effecting a delivery of possession (*Hutchins vs. Gilchrist*, 23 Vt. 86); and, had the order of the acts constituting the whole transaction been reversed, there could have been no question that they constituted an immediate delivery. But since all those acts were done within three and a half consecutive hours, I think that, under the circumstances, the Court may have properly considered the satisfaction and release of the lien held by the Japanese and the delivery of the wood to plaintiff, as parts of the same transaction, and substantially contemporaneous. As soon as practicable after the money loaned by plaintiff was received by the Meyers, Mrs. Meyer paid the demand for which the wood was held in pledge by the Japanese and they released their lien, thus removing all valid objections to plaintiff's rightful possession of the wood."

Dubois vs. Spinks, 114 Cal. 294.

In another case the construction of Section 3440 of the Civil Code was also involved, the question being the sufficiency of delivery of hay in stack. The husband had conveyed certain stacks of hay to his wife and it was contended that there had been no sufficient delivery as against attaching creditors because

the hay had not been removed. The lower Court sustained this contention but the judgment was reversed by the Supreme Court, the Court saying:

“The Code provides no different rule as to the formality of such transaction between husband and wife, from that required between strangers; yet the law giving a reasonable construction to all such statutes, takes into consideration not only the character of the property, but the relations of the parties and the use of the property intended, and only requires that which would naturally be done in an honest and business-like transaction where there was no thought of fraud or concealment. Indeed, any other course, whilst it might unquestionably fulfill the strictest requirements of the statute touching on actual and continued change of possession, would at once suggest as the reason for such departure an intention to defraud. She was not bound to remove the hay to other land, nor to own the land upon which the stack stood.”

Porter vs. Burcher, 98 Cal. 456.

Byrnes vs. Moore, 93 Cal. 394.

Claudius vs. Aguirre, 89 Cal. 503.

O'Brien vs. Ballou, 116 Cal. 320 is an “all fours” with the case at bar. One Bruce was farming about 320 acres of land sown to wheat.

About 60 acres of this land was rented from one Wyman, and the residue which was adjoining, from one Jack. Bruce was indebted to O'Brien for wages and agreed to convey him sufficient of the crop to pay his wages. The proposition was accepted and a bill of sale of all the wheat grown on the sixty acres in the Wyman tract was made to O'Brien. The wheat was harvested, kept separate from that on the Jack ranch and placed in a pile where it was MARKED BY O'BRIEN WITH HIS INITIALS. While in this condition, the wheat was attached by defendant, Ballou, under a writ of attachment against Bruce, who thereafter went into voluntary insolvency. The contention was that the transfer of the crop from Bruce to O'Brien was void under the statute of frauds, the Court in answer to this contention said:

“The sale passed the title to plaintiff without a delivery of possession. When it was harvested, the ground upon which it was grown was, so far as appears, vacant and unoccupied. The BRAND UPON THE SACKS WAS SUFFICIENT TO NOTIFY THE PUBLIC OF PLAINTIFF'S OWNERSHIP. We attach little importance to the fact that plaintiff was working for Bruce. (Bernal vs. Hovious, 17 Cal. 542; Vishner vs. Webster, 13 Cal. 58.) The evi-

dence was sufficient to support the verdict, and on the showing of plaintiff, the contract was not void under the statute of frauds."

O'Brien vs. Ballou, 116 Cal. 320.

Davis vs. McFarlane, 37 Cal. 634.

Raventas vs. Green, 57 Cal 254.

Rosenberg vs. Ross, 6 Cal. App. 759.

In *O'Brien vs. Ballou* the Court disposed of counsel's contention that as Dent was working for Ikeda, Richardson's request to Dent operated to prevent transfer of possession. The test in all these California authorities clearly points to the proposition that the statute simply requires **sufficient notoriety** to acquaint the general public with the fact that a transfer has been made. That there was sufficient notoriety as far as the 216 bales of hops are concerned is patent. Any one going on the premises would know that the hops had been segregated, accepted and marked and could not fail to understand that they occupied a different position than the unmarked and unbaled hops.

Williston on Sales has been cited in support of counsel's contention. It is sufficient to say of the quotation from Williston, that with all respect due such distinguished authority, the conclusion reached therein is at variance with the conclusions reached by the Federal Court in

Adams vs. Collier, 122 U. S. 382.

Hewitt vs. Berlin, 194 U. S. 296.

McElwée vs. Metropolitan, 69 Fed. 205.

Mills vs. Virginia, 20 A. B. R. 750.

Baars vs. Mitchell, 154 Fed. 322.

and numerous other cases cited in briefs on file.

In *Stelling vs. Jones Lumber Co.*, 2 A. B. R. 532, the Court construed a law of Wisconsin similar to Section 3440 of the Civil Code and it was said that all personal property is not capable of the same sort of possession or delivery and that possession is accomplished when it is such as the nature and character of the property will admit. If actual delivery be not practicable *constructive or formal delivery is sufficient*. In all such cases, the law takes cognizance of the *character of the property, the nature of the transaction, the possession and relation of the parties to the sale and the intended use of the property*.

Counsel makes the point that money paid by Richardson to Ikeda was merely advanced as a loan and was not part of the purchase price. Our answer to this contention is found in

Atchinson Ry. vs. Hurley, 18 A. B. R. 403.

There the bankrupt had agreed to deliver a certain amount of coal at an agreed price. Advances were made by the claimant on the pur-

chase price and it was held :

“The money paid in advance entitled the Railway Company to an amount of coal which the money so advanced would pay for according to the terms of the original contract * * * We cannot agree with the learned trial Court that the parties intended the advances to be independent transactions disconnected from the original lease and resulting only in simple contract debts or unsecured loans to the coal company. On the contrary, we think, as already stated, that the parties intended to appropriate and secure to the Railway Company sufficient coal when mined to repay the advances made by it.” “Does the bankruptcy of the latter company deprive the former of the same remedy against the Trustee? The administration and distribution of the property of bankrupt’s is a proceeding in equity and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal, or equitable or both.”

Atchinson Ry. vs. Hurley, 18 A. B. R. 403.

There can be no doubt if the hops here in question had not been subject to this contract of sale, and the purchaser had actually paid thereon most of the agreed purchase price and

had marked the hops as Richardson did, the sale would have been good. Certainly the fact that money was advanced to assist the bankrupt in maturing the crop does not change the status of the purchaser.

On the question of preference we think little need be said. There can be no voidable preference where the recipient did not know of the intent to give a preference.

Summerville vs. Stockton, 142 Cal. 529.

In Re Benjamin, 140 Fed. 320.

So far as shown here there was nothing even to put the claimant on inquiry. He had made advances on the hops as required by the contract, and as required by Ikeda. Even had he known that Ikeda was short of money no presumption is raised thereby under the bankruptcy laws that Ikeda was a bankrupt. The subsequent adjudication raises no presumption of prior insolvency.

In Re Chappell, 113 Fed. 545.

The test of bankruptcy is that the bankrupt's property at a fair valuation does not equal his liabilities, not that he shall be short of ready money. Nothing is shown to establish that Ikeda's property at a fair valuation was insufficient to pay his debts. Nothing whatever is introduced in evidence to show knowledge or even to put the claimant on in-

quiry as to Ikeda's condition financially. The evidence resolves itself into this, that Ikeda performed his contract by delivering the hops. And nothing brings out more forcefully the fact that Richardson was not a mere creditor of Ikeda than the fact that he is not put on inquiry by the delivery to him of the hops. Had Ikeda attempted to deliver the hops to his laborers or to the Pioneer Fruit Co., they might have been charged with knowledge that Ikeda's financial condition was doubtful.

Wright vs. Sampter, 152 Fed. 198.

The payments through all the period from the making of the contract to the delivery of the hops and the actual delivery itself, all form but one transaction, all look to one end. The case in its facts is plainly different from one where loans were made from time to time looking merely to a promise to repay. In the latter case a subsequent payment thereof would be voidable preference, whether made in money or other property, but there is merely one transaction with a number of connected acts. The delivery of the hops was for full and adequate consideration. As was said in *Re Newton*, 153 Fed. at page 845:

“The right of claimant in this case did not first come into existence when it took possession of the property in question on the eve of the bankruptcy proceedings. On the con-

trary, it was secured by the contract which was executed almost a year before, and it is that date which we must regard rather than the date when the possession was taken."

In *Mills vs. Virginia*, 20 A. B. R. 750, the Circuit Court of Appeals held that a claimant was entitled to recover from the Trustee all goods that the claimant had paid for under a contract similar to the one here in question, and that, consequently, deliveries that the bankrupt had already made could not be construed as preferences.

It may be that counsel is confused by certain cases in which the Court has permitted the Trustee, by order made before the appointment of the trustee, to be subrogated to the rights of execution creditors. No such action has been taken here and it is now too late for such action to be taken. We quote from *Davis vs. Crompton* (*supra*):

"It only remains to consider the remaining contention of the appellant, that he has been subrogated by the Court below to the rights of the Chautauqua Worsted Mills, plaintiff in a judgment and execution levied upon the property in question, August 29, 1905. As to this we cannot do better than quote again the language of the learned Referee:

" 'Under Sec. 67F of the bankrupt

law it is provided that "all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt." In this case the Chautauqua Worsted Mills entered judgment and issued execution and levied upon the property on August 29, 1906. The petition in bankruptcy was filed in September 7, 1906, whereby the judgment and levy obtained through the legal proceedings in the State Court, became null and void upon the subsequent adjudication of the bankrupt on October 15, 1906. Sec. 67F further provides that "the property affected by levy, judgment, attachment or other liens shall be deemed wholly discharged and released from the same and shall pass to the Trustee as a part of the estate of the bankrupt." By the subsequent proceedings in bankruptcy, therefore, the lien of the Chautauqua Worsted Mills was destroyed. The receiver having obtained a restraining order from the District Court, took possession of the property from the Sheriff and in so taking it took it wholly discharged and released from the lien of the levy. Now, Section 67F further provides that such lien shall be deemed wholly dis-

charged and released "unless the Court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the Trustee for the benefit of the estate aforesaid." The Trustee did not attempt to preserve this lien. It was the receiver, who, through the restraining order, obtained possession of the property discharged of the lien; no proceedings were taken to preserve this lien, and it was not until April 4, 1907, in the midst of the controversy arising between the conditional vendor (claimant herein) and the Trustee that the Trustee filed a petition praying to be subrogated to the rights of the execution creditors; upon which petition an order of subrogation was entered. An examination of the record shows that the execution creditors no longer had any rights at the time the order of subrogation was made, and therefore, the Trustee took nothing by virtue of said order.'

Concurring as we do in these views it is not necessary to consider whether, if the order of subrogation had been made in time, the bankrupt's estate would have been benefitted thereby; nor are we called upon to say how such a lien, obtained by a single creditor,

could be prevented for the benefit of the creditors at large; nor at what time or by what process such suborgation can be effected.

We have not thought it necessary to analyze the numerous authorities referred to by counsel. We think we have already shown that the decision of the Supreme Court of the United States in *York Mfg. Co vs. Cassell* is controlling in this case and the respondent is entitled to all of this property as against the Trustee in bankruptcy.

Counsel have collated many authorities from other states. Some of the propositions announced, such as concurrent possession by vendor and vendee, we do not dispute. We have heretofore noticed the contention that Ikeda was in possession because Dent, his employee, was asked to look after the hops until Monday, when Richardson would remove them, and we think this court will say with the Supreme Court of California, "we attach little importance to the fact that (Dent) was working for (Ikeda)."

We have not taken the time to discuss each authority separately and will content ourselves with the suggestion that cases cited in this brief, together with cases cited in other briefs on file, show conclusively that decisions of the Federal Courts and the Supreme Court of California are unanimous in their repudia-

tion of counsel's argument that there was no sufficient delivery as to the 216 bales of hops. The authorities cited touching preference are wide of the mark. There was no preference in this case. The contract was made in March, 1909. The advances upon the purchase price were for the specific purpose of enabling Ikeda to mature this crop and Richardson had advanced practically all of the purchase price of the entire crop prior to August 28th, 1909, and the segregation, acceptance, marking and consequent delivery of 216 bales of the hops on that date was in line with the contract. There is no hint whatever of any preference. Creditors certainly were not injured, for had it not been for the money advanced upon the purchase price, there would have been no crop.

Counsel's plea for the creditors upon the equitable feature of the action falls flat when this suggestion is given due weight. Richardson had supplied ample money to pay laborers and everyone connected with the cultivation and maturing of this crop. The equities are all his way and he is protected by the law as declared by the Federal Courts and the Courts of the State of California. There was a delivery of 216 bales of hops to Richardson long prior to the commencement of the proceedings in bankruptcy and hence the

Trustee, who must rely upon the title and rights of the bankrupt cannot invoke the rights of creditors, even if their equities conflict with the rights of the respondent.

We submit that if there is to be revision of the decision that revision should result in awarding the entire 357 bales of hops to Richardson, or at least enough of the hops at the contract price to reimburse moneys advanced upon the purchase price.

In concluding, we ask the Court to examine the other briefs on file in behalf of Richardson, the respondent here, as many authorities not herein mentioned are cited. The case was fully and completely argued in briefs submitted to the Referee and considered by Judge De Haven, and we suggest that argument in said briefs contained may be more helpful than this brief.

We respectfully submit that the decision of Judge DeHaven should be affirmed and that, if revision of said decision is to be had, it should result in awarding respondent the entire crop upon his payment to the Trustee of the sum of \$202.25 remaining due thereon under the contract.

Respectfully submitted,

C. E. McLAUGHLIN,
White, Miller & McLaughlin,
Attorney for Respondent.

UNITED STATES
CIRCUIT COURT OF APPEALS
For the Ninth Circuit

M. N. WILLIAMSON, Trustee in Bankruptcy of the
Estate of George M. Ikeda, Bankrupt,
Petitioner,
vs.
W. M. RICHARDSON,
Respondent.

*PETITIONER'S POINTS AND AUTHORITIES
IN REPLY.*

The respondent takes the position, and contends:

1. That the trustee in bankruptcy stands in the shoes of the bankrupt and can assert no right nor interpose any defense which would not be available to the bankrupt himself.

2. That the respondent had a lien, as between Ikeda and himself, on all the hops.

3. That except in cases of fraud, etc., the estate of a bankrupt is brought into court and appropriated in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in his hands.

4. That the trustee takes no title and has no right which the bankrupt himself could not assert; that he takes only such title as the bankrupt could have transferred without consideration.

5. That the contract between the respondent and Ikeda was not executory merely, but with the subsequent acts of the parties, passed the title to all the hops to the respondent.

6. That at least 216 bales of the hops had been delivered to the respondent prior to the adjudication of bankruptcy.

7. That Section 3440 of the Civil Code of California does not apply, because the transaction in question should not be judged by the standard by which a transaction is judged when effecting creditors, but by the standard used between the parties.

8. That, even if the Civil Code section does apply there was a delivery sufficient to meet the requirements of that section.

9. That the money paid Ikeda by the respondent under the contract was not an advance, but the payment of the purchase price.

10. That there can be no preference where the recipient did not know of the intent to give it.

The whole argument of the respondent is based upon the assumption that the contract between Richardson and Ikeda constituted a sale of the hops; that the money paid by Richardson to Ikeda was parts of the purchase price and not a loan or advancement, and that, therefore, the title had passed to the respondent prior to the adjudication of bankruptcy. This is shown by his opening statement of facts. He there states that by the contract of March 3d, 1909, "*Ikeda unequivocally agreed to sell and Richardson to buy.*" That "*the agreement further*

contained provisions obligating Richardson to advance certain portions of the purchase price." The contract does not contain such language. This is merely the respondent's construction of it. The contract is set out in full in the petition for revision and speaks for itself. The petitioner's construction of it, and by which construction the contract does not constitute a sale, but is a mere executory agreement, is given, with the authorities to support it, in the plaintiff's Points and Authorities now on file, and we will here but refer to it.

Again the respondent's position and contentions rest upon the rule that a trustee succeeds only to the interest of the bankrupt, and does not succeed to the rights of the creditors or take any of the remedies given to the creditors by statute.

While this may have been the rule under the Bankruptcy Act of 1867, and is probably the rule where there are no attaching creditors or creditors who may invoke the remedy given, it is clearly not the rule in a case such as this where there are attaching creditors and where there is in force a statute such as Section 3440 of the Civil Code of California.

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the prop-

erty, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, *and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself*, and against purchasers or encumbrancers in good faith subsequent to the transfer.”

The statute here expressly gives a right to the remedy—makes the transfer void as to the trustee—for it cannot be said that he is not a successor in interest of the creditors, or one upon whom the estate of Ikeda devolved in trust for the benefit of others than himself.

Not only by this statute of California is the right conferred on the trustee, but it is also expressly conferred upon him by the Bankruptcy Acts itself.

Bankruptcy Act of 1898, Sec. 70a.

Remington on Bankruptcy, p. 676.

In speaking of this section of the Act, Mr. Justice Peckham has said:

“By Section 70a the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon

and sold by judicial process against him; and by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same."

Security Warehousing Co. v. Hand, 19 A. B. R.
291 (298).

TITLE TAKEN BY THE TRUSTEE.

In his argument that the trustee stands in the shoes of the bankrupt and can exercise no right that the bankrupt himself could not have exercised, the learned counsel for the respondent has entirely ignored the foregoing, and all the cases cited by him under this head are cases in which no such right was given by statute or cases whose peculiar circumstances, such as the non-existence of creditors who could invoke the remedy, took them out of the operation of the rule.

Of the cases cited by the respondent on this point:

Dunlap Silk Co. vs. Spencer, 115 Fed. 695, involved the construction of an ordinary building contract with provision that in case of abandonment by the contractors, the owner might proceed to complete the work with the materials on hand, and it was held that the materials delivered on the job were already

in possession of the owner, and that neither the contractor nor his creditors could have in law or equity siezed or prevented their use in the completion of the building.

In *re Chase*, 124 Fed., 753, the bankrupt before the adjudication made an assignment for the benefit of creditors. The assignee paid out certain moneys for the benefit and preservation of the estate, and it was held that he had a preferred claim therefor on the ground that the value of the property had been enhanced by the expenditure, and that the assignment was, in legal effect, the same as the appointment of a receiver.

In *re Youngstrom*, 153 Fed. 104, the question was the setting aside of a homestead to the family of the bankrupt as exempt property. The homestead was not properly selected nor exempt under the state law, and therefore held not exempt under the Bankruptcy Act.

In *Security W. Co. vs. Hand*, 19 A. B. R., 295 (U. S. Sup. Ct.), there was a question of actual fraud. A field warehouse company, being one having no warehouse but issuing certificates for goods left in the possession and on the place of the bailor, it was held that such receipts were not negotiable, and under the law of Wisconsin their assignment did not amount to a delivery of the goods nor vest any title in the assignee of the certificates.

In *Hewitt vs. Berlin*, 194 U. S., 296, there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid

for and, as such conditional sale was valid under the law of New York, it was held good as against the trustee because good against the bankrupt.

York vs. Cassel, 201 U. S., 344, involved the same question.

In *re Dunlap*, 19 A. B. R., 368, involved a conditional sale under the laws of the state of Minnesota, which provide that a contract of such sale must be recorded or it is voidable by attachment creditors, judgment creditors and bona fide purchasers only, and there were no such creditors or purchasers in that case.

In both *Humphrey vs. Tatman*, 198 U. S., 91, and *Thompson vs. Fairbank*, 196 U. S., 516, the question was the rights of a mortgagee who had taken possession of mortgaged property before the filing of the petition in bankruptcy. The mortgagee was held entitled to hold against the trustee because under the laws of the state where the mortgage was made such taking of possession related back to the date of the mortgage.

Stewart vs. Platt, 101 U. S., 739, arose under the Bankruptcy Act of 1867, and involved a chattle mortgage good as between the parties but void as to creditors. It was held that the creditors were entitled to payment, and the mortgagee to any balance remaining.

Adams vs. Collier, 122 U. S., 382, arose under the old Bankruptcy Act, and holds that an assignee cannot assail a voluntary conveyance unless voidable

for fraud, and it was found there was no fraud in that case.

Yeatman vs. Savings Institution, 95 U. S., 764, was also under the old Act, and merely holds that a pledgee holding under a valid pledge was not guilty of conversion by refusing to surrender the pledged property to the assignee in bankruptcy.

Gibson vs. Warden, 14 Wall., 242, also under the old Act, merely construes the two classes of persons mentioned in Section 35 of that Act.

Cook vs. Tullis, 18 Wal., 332, involved the proceeds of trust property which, of course, the assignee did not take.

Mitchell vs. Winslow, 2 Story, 630, and *Brown vs. Heathcote*, 1 Atk., 160, were under statutes entirely different from those involved here.

Counsel for the respondent says (p. 9) that, applying these authorities to the case at bar, it is clear the trustee had no enforceable rights to the hops. We submit that a mere glance at the cases show they have absolutely no application to the facts of this case. In every one of the cases cited there was the application of a statute entirely different from those governing here or such peculiar facts and conditions that the bankrupt himself had no legal title at the time of the adjudication, and that under the authorities cited in the petitioner's points and authorities it must be held that the title to the hops passed to the trustee.

THE PASSING OF TITLE FROM IKEDA TO
RICHARDSON.

Whether or not the respondent Richardson ever took any title to the hops depends upon the construction of the contract between Ikeda and Richardson.

This question is discussed at length in the Petitioner's Points and Authorities (p. 5 *et. seq.*) where it is shown that the contract did not constitute a sale, but was only an executory agreement of sale. The respondent's position cannot be sustained unless it be found that there was a sale at the time the contract was made and the intent then was that the title should pass to Richardson.

We will not again go over the ground covered in the points and authorities before presented, but by the contract :

Richardson agrees to pay upon delivery. He has a right of rejection. Delivery is to be made at the railroad station. The moneys Richardson advanced were at the time of the delivery of said hops to be deemed part payment of the purchase price. If the hops were not delivered Richardson was to be repaid the advances with interest.

Take this contract and apply to it the old familiar test: Had the hops been destroyed before Richardson had accepted and received them, upon whom would the loss have fallen? That party had the title. We have no doubt had that event occurred counsel would have advised, and rightly so, Richardson to have refused to stand the loss.

In all of the cases cited by the respondent upon

this point the Court found there had been an actual sale and passing of title.

Benjamin on Sales is cited to show that an agreement of sale may be made in two separate parts, and that a condition as to delivery may be waived by party for whose benefit it is made. There is no question of these legal propositions, but they do not apply to the facts in this case.

Counsel's statement that Richardson was to return and haul the hops to the station, and that he thereby waived the condition of delivery is not borne out by the record. At page 19 of the petition for revision we find the following:

"4. At three o'clock in the afternoon of said 28th day of August, 1909, Richardson and his agent, Koch, left the Rideout Ranch. It was the understanding at that time that they should return on the following Monday, *and that some of the bales of hops at that time should be hauled to the Rideout Station BY IKEDA.*"

On page 20 there appears this testimony of the agent of the respondent:

"Q. When you and Mr. Richardson went over, your intention was to inspect the hops as you have testified, and then go back on Monday and haul them from the ranch to the depot; is that right?

"A. Well, we never—

"Q. Have them hauled?

"A. Yes, sir—well, we won't haul them. It is the grower's place to haul the hops."

In *McElwec vs. Metropolitan L. Co.*, 69 Fed., 302,

a contract was made between the bankrupt and the lumber company, by which the bankrupt bought all the lumber manufactured at a certain mill during a certain period, with provision that on the first of each month all the lumber manufactured during the preceding month should be shipped to the bankrupt on his giving ninety-day notes in payment therefor, and further provision that if the bankrupt did not desire to take the lumber as fast as manufactured he might renew his notes as long as the lumber remained in the maker's possession, but not to exceed ninety days. The Court held the makers had a vendor's lien on the lumber while in their possession, and, therefore, the question whether or not the title had passed was immaterial.

In *Mills vs. Virginia, etc. Co.*, 20 A. B. R., 750, the bankrupt borrowed \$750, for which he gave notes and a deed of trust; he also contracted with the payee to purchase certain lumber, and on the strength thereof was advanced \$950, for which there was no security. This all happened within four months of the adjudication. Within a few days prior thereto the payee of the notes took from the bankrupt about \$1000 worth of lumber. It was contended that in so doing the payee accepted a preference so as to bar a claim for the \$750. The ruling was against this contention.

Stelling vs. Jones Lumber Co., 8 A. B. R., 521, was a suit in the nature of an equitable replevin by a trustee in bankruptcy against a third person. It involved a question of what constitutes manual de-

livery under the law of Wisconsin. Under the peculiar circumstances of the case it was held that under the contract in controversy it was the intent of the parties that title should pass absolutely, and that there was sufficient delivery.

Hauslet vs. Harrison, 105 U. S. 401, was under Act of 1867, and it was held that the contract involved constituted an equitable mortgage and was not tainted with fraud.

In *Baars vs. Mitchell*, 154 Fed., 322, the Court found that there was an actual and complete sale of the property and vesting of the title and an actual payment of 75 per cent of the purchase price.

In *Williams vs. Borgwaldt*, 119 Cal., 80, certain sheep were attached as belonging to a vendor. The vendee effected a compromise and took possession of the sheep. After this another attachment was levied for a debt of the vendor, and it was held that the vendee, being then in possession, the attachment would not hold.

DELIVERY UNDER THE CALIFORNIA STATUTE.

The respondent contends that in this case there was such a delivery of the 216 bales by the inspection and marking prior to the attachments and adjudication of Ikeda's bankruptcy, as will meet the requirements of the Civil Code, Section 3440.

Counsel's argument cannot be disputed, but again it is not supported by either facts or the law, and the cases cited were based upon such peculiar facts

and circumstances that they cannot be held to apply to this case.

We agree with counsel that each case must be judged in view of its own peculiar facts and circumstances.

Here there was nothing done towards a delivery except an inspection of some of the hops, a marking of some of the bales inspected and an understanding that they *were to be delivered* the following Monday. Under the contract Richardson had a right of inspection before determining whether or not he would buy. If he accepted Ikeda was to deliver at the depot and then the price became due. As shown above, Richardson intended to exact performance of the agreement of Ikeda to haul to the station, and is it not the most reasonable construction that the marking was intended as evidence of acceptance or approval, and never was intended as evidence of a delivery? The delivery was to be made the following Monday.

In view of these facts and circumstances of the case the decisions cited by the respondent can all be distinguished and, therefore, do not apply.

Dubois vs. Spinks, 114 Cal., 292, is stated by the learned counsel for the respondent to be a leading case upon the subject. In that case there was a conflict in the evidence as to the delivery. The language quoted on page 22 of the respondent's brief shows this to be the principal ground of the Court's ruling. One hundred and twenty-six cords of wood were involved, and all the acts of sale and delivery were

had within a space of about three hours. We fail to see how this case can be of comfort to the respondent, but to the contrary, by analogy, it sustains the petitioner's position.

Porter vs. Bucher, 98 Cal., 456, involved a sale of hay by one joint tenant to another, and the holding is that such joint tenant, in taking possession, was not required to remove the hay from the land.

Byrnes vs. Moore, 93 Cal., 394, merely decided that the granting of a motion for a non-suit was erroneous, there being some evidence tending to show a delivery.

In *Claudius vs. Aguirre*, 89 Cal., 503, the lower Court found upon conflicting evidence that there had been the necessary change of possession, and, under the long established rule, the Supreme Court refused to review the question.

O'Brien vs. Ballou, 116 Cal., 320, is stated by the respondent, at page 24 of his brief, "to be a case on all fours with the case at bar." Counsel again assumes that in the case at bar there was an actual sale and delivery by *Ikeda* to *Richardson*, otherwise the O'Brien case cannot apply. In that case a growing crop was the subject of the sale, and by counsel's own comments and quotation from the decision it is clear there was an actual sale. It was not a contract to sell something, but an actual sale of all wheat grown upon a particular piece of land, which was not in the possession of the vendor, and after the sale the vendee harvested the wheat as his own

and thereafter exercised such dominion over it as is usual in such cases.

Davis vs. McFarlane, 37 Cal., 634; *Rarentas vs. Green*, 57 Cal., 254; *Rosenberg vs. Ross*, 6 Cal. App. 759, and *Sommerville vs. Stockton*, 142 Cal., 529, each involved the delivery of a growing crop. Growing crops are of necessity governed by a different rule, actual manual delivery being impossible, but in each of these cases there was some acts of delivery.

On page 26 of the respondent's points and authorities the section from *Williston on Sales*, quoted in the plaintiff's points and authorities, is criticised and stated to be contrary to decisions of the United States Supreme and other Federal Courts. We have hereinbefore reviewed each of these decisions and shown that insofar as they have any tendency to hold against the rule laid down by Mr. Williston they are governed by peculiar facts and circumstances which take them out of the general rule, or by some special statutory provision, and we again submit the text from Williston as the latest expression of any eminent writer upon the subject.

**THE MONEY ADVANCED TO IKEDA WAS NOT
THE PURCHASE PRICE.**

The respondent contends that Richardson, in paying certain moneys over to Ikeda, did not make advances, but paid the same on account of the purchase price of the hops. There can be no question but that these moneys were paid pursuant to the contract.

The provisions of the contract regarding these moneys are found on pages 15 and 16 of the petition for revision. Richardson agrees *to advance—at the time of delivery, the money advanced is to be applied on the purchase price. The money advanced shall bear interest. If the hops are not accepted it shall be repaid, etc.* Do these provisions in any way sustain the proposition that these moneys were payments on account of the purchase price? Do they not bear all the earmarks of advancements or loans?

Atchison, etc. R. Co. vs. Hurley, 18 A. B. R., 403, is cited as showing these moneys to have been paid on the purchase price. We can find nothing in the case in any way tending to throw light on the subject. That case involved a contract which was assumed by the trustee, and the holding is that if the trustee assumes, he must assume it *cum onere* subject to all its provisions and conditions. The trustee assumed a contract under which a railroad company advanced money for the mining of coal, and for which it was to receive coal sufficient to cover the amount.

THE SUBJECT OF PREFERENCE.

Upon this subject we will rest content with what is said in the petitioner's points and authorities now on file. All that is said by respondent's counsel is based upon the assumption that the title to the hops was vested in Richardson; that his contract with Ikeda was and constituted a present sale, and such

must be found to be the fact before any of the authorities cited by him under this head can apply. If such is not the fact they have no reference to this case.

CONCLUSION.

As we said in opening these points and authorities, the respondent bases his whole case, as he in fact must, upon the assumption that there was an executed and completed sale of the hops from Ikeda to Richardson prior to the adjudication of the bankruptcy of Ikeda. We have reviewed every case cited by him and have shown it has no application whatever to this case unless the fact of such a sale has been established. We feel justified in saying we have here and in the petitioner's points and authorities on file demonstrated that no such sale existed; that Richardson had no title to the hops; that the title was in the bankrupt and hence vested in the petitioner, the trustee, and this being the case the judgment of the District Court must be reversed and that of the referee sustained.

Respectfully submitted,

ROBERT T. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Petitioner.

United States
Circuit Court of Appeals

For the Ninth Circuit.

GREAT WESTERN LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ESTA M. SNAVELY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED

JAN 24 1913

No. 2231

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT WESTERN LIFE INSURANCE COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

H. J. MILLER, Esq., Attorney for Defendant and
Plaintiff in Error,

Livingston, Montana.

E. M. NILES, Esq., and FRED L. GIBSON, Esq.,
Attorneys for Plaintiff and Defendant in Error,

Livingston, Montana.

[Transcript on Removal.]

*In the District Court of the United States in and for
the District of Montana.*

No. 1041.

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

BE IT REMEMBERED, that on the 25th day of
February, 1911, a Transcript on Removal from the
District Court of the Sixth Judicial District of the
State of Montana, in and for the County of Park, was
duly filed herein, which said Transcript (except that
portion thereof omitted by stipulation) is in the
words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

*In the District of the Sixth Judicial District of the
State of Montana, in and for the County of Park.*

ESTA M. SNAVELY,

Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
COMPANY OF KANSAS CITY, MO.,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of
action alleges:

I.

That the defendant is a corporation organized and
existing under and by virtue of the laws of the State
of Missouri.

II.

That on the 27th day of December, 1907, at Kansas
City, Mo., the defendant, in consideration of the an-
nual payment by Arthur G. Snavely of Livingston,
Mont., to the said company of the sum of One Hun-
dred Sixty-four and 70/100 (\$164.70) Dollars, made
their policy of insurance in writing, of which a copy
is hereto annexed, marked Exhibit "A" and made a
part of this complaint, and thereby insured the life
of the said Arthur G. Snavely in the sum of Five
Thousand Dollars.

III.

That on the 3d day of July, 1910, at Livingston,
Mont., the said Arthur G. Snavely died.

IV.

That the plaintiff is the widow of the said Arthur
G. Snavely and is the beneficiary named in the said

policy of insurance, and as such had a valuable interest in his life. [2]

V.

That on or about the 20th day of July, 1910, the plaintiff furnished the defendant with the proof of the death of the said Arthur G. Snavely, and that the said Arthur G. Snavely and the plaintiff have each duly performed all of the conditions of said insurance contract on their part.

VI.

That the defendant has not paid the said insurance nor any part thereof, and that the said sum of Five Thousand Dollars is now due thereon from the defendant to the plaintiff as such beneficiary.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of Five Thousand Dollars, with interest thereon at the rate of eight per cent per annum from the 3d day of July, 1910, together with costs and disbursements herein.

E. M. NILES,
Attorney for Plaintiff,
Livingston, Montana.

[For Plaintiff's Exhibit "A," Insurance Policy, see Exhibit inserted in Bill of Exceptions, p. 19.]
[3]

State of Montana,
County of Park,—ss.

Esta M. Snavely, being first duly sworn, upon her oath says that she is the plaintiff in the foregoing entitled action; that she has read the foregoing complaint and knows its contents, and that the same is true of her own knowledge.

ESTA M. SNAVELY.

E. M. MILES,

4 *Great Western Life Insurance Company*

Subscribed and sworn to before me this the 21st day of November, 1910.

[Seal]

E. M. NILES,

Notary Public for Montana, Residing at Livingston,
Montana.

My commission expires Aug. 3, 1912.

[Indorsed]: Title of Court and Cause. Complaint. Filed Feb. 25, 1911. Geo. W. Sproule, Clerk U. S. Circuit Court, District of Montana. [4]

*In the District Court of the Sixth Judicial District of
the State of Montana, in and for the County of
Park.*

ESTA M. SNAVELY,

Plaintiff,

against

THE GREAT WESTERN LIFE INSURANCE
COMPANY,

Defendant.

Summons.

The State of Montana Sends Greeting to the Above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court this
12th day of January, 1911.

[Seal]

ARTHUR DAVIS,

Clerk.

By W. H. Pethybridge,

Deputy. [5]

Sheriff's Office.

State of Montana,

County of Lewis and Clark.

I hereby certify that I received the within summons and copy of the complaint in said action on the 16th day of January, A. D. 1911, and personally served the same on the 16th day of January, A. D. 1911, on H. R. Cunningham, as Commissioner of Insurance of the State of Montana, by delivering to and leaving with said Commisisoner personally, in the county of Lewis and Clark, State of Montana, a copy of said summons and of said complaint.

Dated this 16th day of January, 1911.

MARTIN L. HIGGINS,

Sheriff.

By W. H. McCann,

Deputy Sheriff.

SHERIFF'S FEES:

Service on\$1.00

Mileage..... .20

Total.....\$1.20

Paid by Plaintiff.

[Indorsed]: Title of Court and Cause. Summons.
Filed Feb. 25, 1911. Geo. W. Sproule, Clerk U. S.
Circuit Court, District of Montana. [6]

And thereafter, on the 21st day of April, 1911, the defendant's Answer was duly filed herein, being in the words and figures following, to wit: [7]

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, in and for the Southern Division of the District of Montana.

ESTA M. SNAVELY,

Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
COMPANY OF KANSAS CITY, MIS-
SOURI,

Defendant.

Answer.

Comes now the defendant in the above-entitled action and for answer to the complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Defendant denies each and every and all and singular the allegations set forth and contained in said complaint, except that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri.

II.

Defendant alleges that the plaintiff should not recover by virtue of the facts alleged in said complaint, for that all of the conditions and agreements mentioned in the copy of said insurance policy attached to the plaintiff's complaint are herein incorporated the same as if written out herein and the said policy, a copy of which is attached to the plaintiff's com-

plaint, is hereby made a part of this answer by reference, and it is provided therein that if any premium shall not be paid on or before the date when due, the liability of the company shall be only as hereinbefore provided (meaning as provided in said policy, previous to that statement herein).

And the defendant alleges that on the 27th day of December, 1908, there was due according to the terms of said policy, as the annual premium therefor, the sum of \$164.70, and which premium, Arthur G. Snavelly, the insured, failed and refused to pay to the [8] said defendant, and failed and refused to pay the same for more than the thirty days of grace thereafter, whereby, the said policy became, from the 27th day of January, 1909, null and void for non-payment of said premium, long before the death of the said Arthur G. Snavelly mentioned in the complaint, and the said defendant, the said premium not having been paid when due or within the thirty days thereafter by the said Arthur G. Snavelly, did not become liable to the said plaintiff, by virtue of all of the other provisions set forth in said insurance policy, a copy whereof is attached to plaintiff's complaint.

III.

The defendant, further answering the complaint filed in this case, alleges that on the 27th day of December, 1908, and within thirty days thereafter, the said Arthur G. Snavelly mentioned in said complaint failed and refused to pay the premium on said policy as provided therein, whereby the said policy became null and void long before the death of the said Arthur G. Snavelly, but that on the 24th day of February, 1909, the said Arthur G. Snavelly men-

tioned in said complaint made application in writing to the defendant to renew said policy, a copy whereof is attached to the complaint, a copy of which application is in words and figures as follows, to wit:

“Certificate of Health and Revival of Contract.

To and with THE GREAT WESTERN LIFE INSURANCE COMPANY Policy No. 8303, on my life issued by The Great Western Life Insurance Company, having become forfeited and void for the non-payment of premium, due the 27th day of December, 1908.

Now therefore, for the purpose of obtaining a revival or reinstatement of said policy, and as the basis of such re-instatement, I hereby declare to and agree with said company that I am now in good health and free from every ailment and complaint. I further declare and agree that I have not made application for insurance to any company, society or person, upon which application no policy was or has yet been issued to or received by me for the full amount and kind, and at the rate applied for; that there has been no change in family history; that I have not had any injury, sickness or ailment of any kind; and that I have not consulted or been prescribed for by any physician or received any medical treatment since the date of my original application on which said policy was issued, except as here stated:

Operation appendicitis, Sept. 1-08. Off duty two weeks. Entirely recovered. [9]

And I hereby renew the statements and agreements contained in said original application, and expressly agree that if any answer or statement contained therein, except as modified in this contract, or if any

statement made or contained herein be untrue in any respect, then said policy is and shall continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. Said Policy shall not be revived until this certificate and revival contract be approved by said Company, it being understood that the future payments on said policy shall be promptly made.

ARTHUR G. SNAVELY (Insured).

Signature must be in own proper
handwriting of the insured.

Witness: ED. F. PARKER.

Signed at Livingston, Mont., this 24th day of February, 1909."

And falsely and fraudulently, for the purpose of obtaining a revival or reinstatement of said policy, and as a basis of such reinstatement, the said Arthur G. Snavely falsely and fraudulently declared therein to said company that he was in good health and free from every ailment and complaint, and that he had not had any injury, sickness or ailments of any kind, and that he had not consulted or been prescribed for by any physician or received any medical treatment since the date of his original application on which said policy was issued, except an operation for appendicitis, September 12th, 1908, and that he was entirely recovered therefrom, and the said Arthur G. Snavely also agreed in said application for reinstatement that if any answer or statement contained therein was untrue in any respect, then the said policy is and should continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. And the said defendant, believing said false and fraudulent representations to be true,

reinstated said policy on the 6th day of March, 1909, and the said defendant alleges that it was not true that the said Arthur G. Snavelly, on said 24th day of February, 1909, was in good health, and it was not true that he was at that time free of every ailment and complaint, and it was not true that he had not had any injury, sickness or ailment of any kind, but, on the contrary, he had many serious injuries, sicknesses and ailments, from the effects of which he died, and it was not true that he had not consulted or been prescribed for by any physician or received any medical treatment since the date of his [10] original application on which said policy was issued, except an operation for appendicitis, on September 12th, 1908. And it was not true that he had entirely recovered therefrom, and the said defendant alleges that because of said false and fraudulent representations so made by the said Arthur G. Snavelly to this defendant, the defendant was induced to believe the same and thereby did, on the 6th day of March, 1909, revive and reinstate said policy, but the said defendant, as soon as it learned the falsity of said fraudulent representations, to wit, on the 4 day of October, 1910, rescinded said contract of reinstatement and tendered to this plaintiff, on the 8 day of October, 1910, all of the premiums received from the said Arthur G. Snavelly, and which tender was, by the said plaintiff, refused, and the said defendant now brings the said premiums into Court for the said plaintiff to abide the further order and action of this Court, and asks the Court to cancel and annul the said contract of reinstatement induced to be executed by the said Arthur G. Snavelly falsely and fraudu-

lently as aforesaid. That this defendant discovered the falsity of said fraudulent representations as soon after the said reinstatement as it could, under the circumstances, by the exercise of ordinary care and diligence.

WHEREFORE, the defendant asks that said policy be cancelled and held for naught, and that the plaintiff take nothing herein, and for such other relief as to the Court may seem just and equitable and for costs of suit.

MILLER & O'CONNOR,
Attorneys for Defendant.

State of Montana,
County of Park,—ss.

James F. O'Connor, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and as such attorney makes this verification for and in behalf of the defendant. That he has read the foregoing answer, knows the contents thereof and that the same is true to the best of his knowledge, information and belief. Affiant further says that he makes this verification for and in behalf of the defendant, for the reason that no officer of the corporation, the defendant in the above-entitled action, is within Park County where this affiant is and resides.

JAMES F. O'CONNOR,

Subscribed and sworn to before me this 13th day of April, 1911.

[Seal]

H. J. MILLER,
Notary Public for the State of Montana, Residing at
Livingston, Montana.

My commission expires on the 14th day of Nov.
1911.

Filed April 17, 1911. Geo. W. Sproule, Clerk.
[11]

And thereafter, on Aug. 15, 1911, plaintiff filed her
Replication herein, which is in the words and
figures following, to wit:

*In the Circuit Court of the United States, Ninth
Circuit, District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COM-
PANY OF KANSAS CITY, MO.,

Defendant.

Replication.

Now comes the plaintiff and replying to the answer
of the defendant admits, alleges and denies as fol-
lows:

I.

Plaintiff admits that the policy of insurance on
which action is brought herein had lapsed for non-
payment of premium, and admits that the said policy
was reinstated by defendant company on the sixth
day of March, 1909.

II.

That except as above admitted, plaintiff denies
each and every allegation, matter and thing in the
answer of defendant contained.

WHEREFORE, having fully replied to the an-
swer of the defendant, the plaintiff prays judgment
as asked for in her complaint herein.

E. M. NILES,
Attorney for Plaintiff.

Due and personal service of the above Replication and a copy thereof admitted this the 14th day of August, 1911.

MILLER & O'CONNOR,
Attorneys for Defendant.

State of Montana,
County of Park,—ss.

Esta M. Snavely, being first duly sworn, on oath deposes and says: That she is the plaintiff in the foregoing action. That she has read the foregoing replication and knows the contents thereof and that the same is true.

ESTA M. SNAVELY.

Subscribed and sworn to before me this 14th day of Aug., 1911.

[Seal] E. M. NILES,
Notary Public for Montana, Residing at Livingston,
Mont.

My commission expires Aug. 3, 1912.

Filed Aug. 15, 1911. Geo. W. Sproule. Clerk.
[12]

And thereafter, on May 31, 1912, the verdict of the jury was rendered and entered herein, being as follows, to wit:

In the District Court of the United States, District of Montana.

ESTA M. SNAVELY,

Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled action, find the issues in favor of the plaintiff, and assess her damages in the sum of Five Thousand Dollars (\$5,000), with interest thereon at the rate of eight per cent per annum from the 2d day of September, 1910.

FRED W. HILL,
Foreman.

Filed May 31, 1912. Geo. W. Sproule, Clerk.
[13]

And thereafter, on June 11, 1912, Judgment was duly entered herein, in the words and figures following, to wit:

United States District Court, District of Montana.
No. 1041.

ESTA M. SNAVELY,
Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
CO., a Corporation,
Defendant.

Judgment on Verdict.

This action came on regularly for trial on May 31, 1912; the said parties appeared by their attorneys, E. M. Niles and Fred L. Gibson, counsel for plaintiff, and Miller & O'Connor, counsel for defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of the plaintiff were sworn and examined. After hear-

ing the testimony of plaintiff's witnesses and the arguments of counsel, the Court directed the jury to return a verdict for the plaintiff in the sum of Five Thousand Dollars, with interest, whereupon the jury returned to the Court a verdict for the plaintiff, Esta M. Snavely, and against the defendant, The Great Western Life Insurance Co., for the sum of Five Thousand Dollars, with interest thereon at the rate of eight per cent per annum from the 2d day of September, 1910.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, Esta M. Snavely, do have and recover from the defendant, The Great Western Life Insurance Company, the sum of Five Thousand Seven Hundred Dollars, together with plaintiff's costs in this action taxed at the sum of \$98.80.

Judgment entered this 11th day of June, 1912.

GEO. W. SPROULE,

Clerk. [14]

[Certificate to Judgment-roll.]

United States of America,

District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 11th day of June, A. D. 1912.

[Seal]

GEO. W. SPROULE,

Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed June 11, 1912. Geo. W. Sproule, Clerk.
[15]

And thereafter, on August 8th, 1912, defendant's bill of exceptions, as settled and allowed, was duly filed herein, being in the words and figures following, to wit: [16]

[Bill of Exceptions.]

In the District Court of the United States, District of Montana.

No. 1041.

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COMPANY,

Defendant.

APPEARANCES:

For Plaintiffs: Messrs. E. M. NILES, FRED L. GIBSON.

For Defendant: Messrs. MILLER & O'CONNOR.

Due timely and legal service of the within Bill of Exceptions and receipt of a true copy thereof is hereby acknowledged this 29th day of July, 1912.

E. M. NILES,

FRED L. GIBSON,

Attys. for Plaintiff. [17]

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable George M. Bour-

guin Judge of the said court, sitting with a jury, duly called, empaneled and sworn to try said cause, on the 31st day of May, 1912, at the courtroom of said court in the city of Helena, Montana; that the plaintiff was represented by Messrs. E. M. Niles and Fred L. Gibson; and that the defendant was represented by Messrs. Miller & O'Connor; whereupon the following proceedings were had and evidence introduced, to wit:

[Testimony of Esta M. Snavelly, the Plaintiff, in Her Own Behalf.]

ESTA M. SNAVELLY, duly called and sworn as a witness in her own behalf, testified as follows:

Direct Examination.

(By Mr. NILES.)

Q. You may state your name to the Court and jury. A. Esta M. Snavelly.

Q. Where do you reside, Mrs. Snavelly?

A. Livingston, Montana.

Q. And how long have you lived down there?

A. I came to Montana in 1907.

Q. How old are you, Mrs. Snavelly?

A. Thirty years.

Q. And what, if any, children do you have, Mrs. Snavelly? A. Two children, a boy and a girl.

Q. What is their age? A. Three and four.

Q. Are you the widow of Dr. A. G. Snavelly, deceased? A. Yes, sir. [18]

Q. And where and when were you married, Mrs. Snavelly? A. In Ohio,—Canton, Ohio, 1905.

Q. What was your husband's profession, Mrs. Snavelly? A. Dentist.

(Testimony of Esta M. Snavelly.)

Q. When did your husband, Mr. A. G. Snavelly, die? A. July 3d, 1910.

Q. At Livingston? A. Yes, sir.

Q. I will ask you, Mrs. Snavelly, whether your husband had a policy of insurance in any life insurance company at the time of his death? A. He did.

Q. And did he have a policy in the Great Western Life Insurance Company, if you know?

A. Yes, sir.

Q. About when, if you know, was this policy taken out, Mrs. Snavelly?

A. He received the policy some time in January, 1908.

By Mr. MILLER.—We object to the question, for the reason that the pleadings admit the issuance of the policy at the time it was issued.

(Objection overruled. Exception noted.)

Q. Some time in January, 1908. A. Yes, sir.

(Document handed to the reporter by Mr. Niles and marked for identification Plaintiff's Exhibit "A.")

Q. Mrs. Snavelly, is that the insurance policy?

A. Yes, sir, it is.

Q. And in whose possession was that insurance policy [19] at the time of the insured's death?

A. In my possession.

Q. And what, if anything, did you do with it after his death? A. I took it to Mr. Niles.

By Mr. NILES.—We offer in evidence Plaintiff's Exhibit "A."

By Mr. O'CONNOR.—No objection.

Whereupon said Plaintiff's Exhibit "A" was admitted in evidence, and is as follows, to wit: [20]

The Great Western Life Insurance Company.

Kansas City, Mo.

By this Contract of Insurance

Agreed to pay FIVE THOUSAND Dollars

at the Home Office of the Company, in Kansas City, Missouri, as follows:

THE BENEFICIARY	To <u>EUTA M. SNAYELY</u>	
	-WIFE- of the insured, immediately on approval of proofs of the death of the insured during the continuance of this contract.	
THE INSURED	<u>ARTHUR G. SNAYELY</u>	<u>LIVINGSTON</u>
	County of <u>PARK</u>	State of <u>MONTANA</u>

This Contract is issued on the Guaranteed Annual Dividend plan, and if kept in force by payment of premiums in cash, the Company guarantees that such dividends shall be as shown on the Coupons hereto attached.

If the insured shall elect to pay all premiums in full, without deduction, and leave with the Company the dividends represented by the Coupons on this contract, the Company guarantees that this contract will be fully paid-up after paying the premiums in cash for FIFTEEN full years and delivering all attached Coupons to the Company.

In case the insured should elect to leave the Coupons to make this a fully paid-up policy in FIFTEEN years and should die while this contract is in force, but before it is fully paid-up as above provided, all of the Coupons bearing date prior to said death shall be paid to the beneficiary with compound interest at the rate of $3\frac{1}{2}$ per cent per annum in addition to the sum insured.

In case the insured shall not elect as above provided, but shall, nevertheless, leave said dividends with the Company, the same shall be payable, on presentation of the Coupons at any time, with compound interest at the rate of $3\frac{1}{2}$ per cent per annum for each full year such dividends are left with the Company.

STATE OF MISSOURI INSURANCE DEPARTMENT.

This Policy is registered and secured by a pledge of bonds or deeds of trust on real estate deposited with this Department.

Jefferson City, Mo.,

190

By Copy
Deputy Supt.

Copy
Superintendent.

This Contract is absolutely Free from Conditions as to Residence, Occupation, Travel or Place of Death. No Permit or Extra Premium will be required for Military or Naval Service in time of war, or in time of peace.

PREMIUMS ON THIS CONTRACT WILL BE PAID BY THE COMPANY, IF INSURED IS WHOLLY DISABLED AS FOLLOWS:

When the first annual payment shall have been made, and before a claim is for the payment of any subsequent premium, if the Insured shall become wholly and permanently disabled by bodily injury or disease, and will be permanently, continuously and wholly prevented thereby from the performance of any and all gainful occupations, the Company, by its representatives in writing upon this contract, will agree to pay for the Insured the premium, if any, which shall thereafter become payable during the continuance of such disability. In any such case, premium so paid shall not be a lien on this contract and the claim of the Insured, with the schedule as given below, shall increase in the same manner as if the premium were being paid by the Insured. If, however, the Insured shall recover so as to be able to engage in any gainful occupation during the premium-paying period, the Company's obligation to pay the premium shall cease and the Insured shall resume payment of premium in accordance with the schedule on the first premium due date following such recovery.

GRACE IN PAYMENT OF PREMIUMS

A grace of thirty days during which this contract will remain in full force, will be allowed in the payment of all premiums except the first.

REINSTATEMENT OF CONTRACT

In case of default in the payment of any premium or interest, the Company will reinstate the contract at any time, if not previously surrendered for its cash value, upon written application by the Insured to the Company at its Home Office with evidence of insurability satisfactory to the Company, payment of all premiums that would have been paid in the intervening time, 10% discount had been made, with interest thereon at the rate of five per cent per annum (computed) from the premium due date, and payment or reinstatement, with interest at like rate, of any indebtedness existing at the time of default.

GUARANTEED BENEFITS OF THIS CONTRACT

(THIS CONTRACT IS AUTOMATICALLY NON-FORFEITABLE FROM DATE OF ISSUE)

AUTOMATIC EXTENDED INSURANCE

If any premium shall not be paid on or before the date when due and if there be no indebtedness to the Company, this insurance will automatically continue from said due date as term insurance, during the term (including the period of grace) specified in Column 4 of the accompanying table. If there be an indebtedness to the Company, and if any premium shall not be paid on or before the date when due, an amount of insurance equal to the face of this contract less the indebtedness with automatically accruing from said due date as term insurance for the term (including the period of grace) which the excess of the cash value of the contract, if any, over the indebtedness, will purchase at the then age of the Insured according to the Company's present table of single premiums.

PAID-UP INSURANCE

Upon written request of the Insured within six months of the due date and if there be no indebtedness to the Company with in lieu of the Annual Extended Insurance, however on this contract the amount of paid-up insurance, if any, specified in column 3 of the accompanying table.

If there be an indebtedness which shall be less than the cash value, the Company will advance on this contract the amount of paid-up insurance which the excess of the cash value over the indebtedness will then purchase at the Insured's age at the Company's present table of single premiums.

CASH

Upon written request of the insured and surrender of this contract within six months of the due date, and if there be no indebtedness to the Company will pay the amount of cash value, if any, specified in Column 2 of the accompanying table.

If there be an indebtedness the cash payable shall be the excess, if any, of cash value over the amount of the indebtedness.

LOANS

Upon request in writing to the Home Office of the Company, the Insured may borrow on the cash security of this contract the amount specified in Column 4 of the accompanying table for the year in which his loan is to be taken, subject to interest, in advance, at the rate of 5 per cent per annum; the contract shall be assigned to the Company as security according to the terms of the Company's loan agreement, and the Premiums on the contract shall be paid in full to the anniversary of the insurance next succeeding the date when the loan shall be made. The amount available at any time includes any previous loan then unpaid.

The Extended Term Insurance and Paid-Up Insurance amounts shall not be subject to cash loans.

ANNUITY OPTION

At the age of **TWENTY** years, if this contract is in full force and there shall be no indebtedness to the Company, upon surrender of this contract an annuity will be issued guaranteeing an annual income of **ONE HUNDRED FIFTY FIVE AND 00/100...** Dollars

to the Insured during his natural life, the first payment to be made on the **27TH** day of **DECEMBER**, 19**27**

CHANGE OF BENEFICIARY

Provided this contract is not assigned, the Insured may, at any time and from time to time, during his continuance, change the beneficiary, to take effect only when such change and the written consent of the Company shall be indicated upon the contract, or attached thereto, at the Home Office of the Company, whereupon all rights of the former beneficiary shall cease. If there be no beneficiary living at the death of the Insured, the proceeds of this contract shall be paid to the executors, administrators or assigns of the Insured.

GENERAL PROVISIONS

(1) No agent, broker, clerk or business, this contract or extend the time for payment of premium, nor put this contract in force or altered or in any manner waived or extended in any respect, except by the written agreement of the Company, signed by the President, one of the Vice-Presidents, Secretary or Assistant Secretary, whose authority will not be delegated. (2) If the age of the Insured was incorrectly stated in the application for this contract, the amount payable hereunder shall be the insurance which the actual premium paid would have purchased at the true age of the Insured. Age will be assumed on satisfactory proof. (3) If any premium shall not be paid on or before the date when due, the liability of the Company shall be only as hereinafter provided. (4) No assignment hereto shall be binding upon the Company unless made by an instrument in writing indorsed upon this contract or attached hereto, upon which a duplicate shall be furnished to the Company forthwith upon its execution. The Company shall not be held responsible for the validity of any such assignment. Any claim made under an assignment shall be subject to proof of interest and extent thereof. (5) Any indebtedness to the Company, including any balance of the premium for the insurance year remaining unpaid, will be deducted in any settlement on this contract or in any benefit thereunder. (6) In case of suicide, committed while sane or insane, within one year from the date on which this insurance began, the limit of recovery hereunder shall be the premium paid. (7) The interest on this policy during the first year shall be computed as for first year.

PREMIUMS

This contract is issued in consideration of the application hereof, which application is made a part of this contract, and in further consideration of the sum of **ONE HUNDRED SIXTY FOUR AND 70/100.....** Dollars,

to be paid in advance on the delivery of this policy, for one year's insurance from date hereof, and the further payment of a like amount, at the Home Office of the Company, at Kansas City, Missouri, on or before the **TWENTY-SEVENTH** day of **DECEMBER**, 19**27**. In every third year annual premium for **TWENTY** years, including the first year, have been paid.

THIS CONTRACT IS INCONTESTABLE AFTER ONE YEAR FROM DATE OF ISSUE.

Copy Special Income

I

THE GREAT WESTERN LIFE INSURANCE COMPANY hereby agrees to apportion and pay to ARTHUR G. SNAVELY, the insured, annually during his life and thereafter to his beneficiary, a SPECIAL INCOME consisting of $\frac{1}{2}$ share of a SPECIAL INCOME FUND, which FUND shall be equivalent to Twenty-Five Cents (\$0.25) per Thousand Dollars (\$1,000) of all insurance, except re-insurance, written by said GREAT WESTERN LIFE INSURANCE COMPANY in the United States and all foreign countries during

FIFTY (50) YEARS

from November 1, 1907, to November 1, 1957, on which premiums computed on the annual basis have been received in cash by the Company, and for so long thereafter as such premiums are received on such insurance; said SPECIAL INCOME to be determined as follows:

II

Said SPECIAL INCOME FUND shall be ascertained in January for each preceeding year, and such sum divided by

FIFTEEN HUNDRED

less the number of shares lapsed by non-payment of premiums or terminated by the death of beneficiaries; the quotient obtained shall be the apportionment to each of such shares, payable upon the succeeding anniversary of this policy, subject to the payment of the regular required premium on this policy. Each policy of Ten Thousand Dollars (\$10,000) shall represent one share and policies of less denomination shall represent a proportionate part thereof.

III

It is understood and agreed that in consideration of the SPECIAL INCOME paid hereunder, the insured will, upon written request, advise the Company as to the fitness and desirability of agents and applicants for agencies, and furnish, confidentially, such information as he may possess regarding the personal habits of applicants for insurance and those of lapsed policyholders who apply for re-insatement, which might assist in protecting the Company from fraudulent or false claims or fraudulently acquired insurance.

Copy
The Secretary of the Special Income at the time
insured, the conditions of this policy as to payment of premiums
having been complied with, shall be MY WIFE
ESTHER M. SNAVELY

IN WITNESS WHEREOF, The Great Western Life Insurance Company has caused this instrument to be signed by its President and Secretary at the Home Office of the Company, at Kansas City, Missouri, this TWENTY-SEVENTH day of DECEMBER 1907

E. J. Copey
Secretary

O. L. Copey
President

TO SECURE A GUARANTEED ANNUAL INCOME

The proceeds of this contract, if in excess of \$1000, may be placed in trust with the Company for one of the following purposes:

- (1) To pay to the Beneficiary or trustee, if the proceeds become payable during his lifetime, an annual life income or an annual income limited to a period of years, according to the contingencies herein set forth;
- (2) To pay to the Beneficiary or trustee during the continuance of the trust, the amount of any proceeds, or the part thereof remaining with the Company, at the rate of 3½ per cent per annum, such proceeds, or the remainder thereof, to be returned at the termination of the trust or the death of the annuitant; or
- (3) To pay to the Beneficiary or trustee, from the time when the proceeds are payable, an annual life income or an annual income limited to a period of years, according to the contingencies herein set forth;
- (4) To pay to the Beneficiary or annuitant, during the continuance of the trust, the interest on such proceeds, or the part thereof remaining with the Company, at the rate of 3½ per cent per annum, such proceeds, or the remainder thereof, to be returned at the termination of the trust or the death of the annuitant.

If the trust is created by the donor in the lifetime of the beneficiary, the beneficiary cannot sue to terminate the payment of life or limited duration annuity. If the payments are made in trust subject to interest, withdrawal and proceeds on surrender and interest, unless such right is given by the instrument creating such a limited term, this applies by the Company at its Home Office during the life term of the insured.

If the Trust is named by the insured for his own health, it cannot say at any time subsequently, however, it might life or limited insurance at any time which gives the said proceeds or any part thereof remaining unpaid with interest thereon.

If the team is created by the Beneficiary, the Beneficiary may at any time subsequently contents or waive the unpaid fee as stated herein. In any case, within the full amount or any part thereof remaining unpaid with interest thereon.

No trust agreement shall be created or take effect other than by a writing subscribed by the Company at its Home Office and be the person creating such trust. Where a trust is created and a note or bill is issued, and no other provision is made for the security of the loan, no interest shall be made or allowed in the contract.

10 If the mortgagor shall die before paying all of the payments of the loan so limited (except the payments already paid by and
11 otherwise to the mortgagee, administrator or trustee of the mortgagor or if the principal are subject to usual interest only and
12 accretion to any sum then remaining with the Company shall be paid to the executor, administrator or trustee of the mortgagor.

The first payment of life or limited income shall be made as follows: Upon acceptance of satisfactory proof of death of the insured, where the beneficiary is possible at the death of the insured, at upon the institution of the trust where the possible are made in the insured and the trust is created by him, or where the trust is created by the Beneficiary.

The first payment of interest shall be made one year from the date of the execution of deed of trust, when the mortgage is payable at the death of the insured, or six months from the date of the execution of the deed, when the proceeds are payable to the insured and the loan is secured by him, or the loan is secured by the Beneficiary.

Limited Issues		Life Issues	
No.	Amount	No.	Amount
3	\$214	10670	\$4100
4	581	10680	4100
5	628	1106	4100
6	1100	1120	4100
7	127	1143	4100
10	116	1160	4100
11	107	1177	4100
12	100	1200	4100
13	94	1222	4100
14	88	1243	4100
15	84	1260	4100
16	80	1280	4100
17	76	1292	4100
18	73	1314	4100
19	70	1330	4100
20	68	1360	4100
21	65	1361	4100
22	63	1386	4100
23	61	1403	4100
24	60	1440	4100
25	58	1450	4100
26	57	1482	4100
27	55	1485	4100
28	54	1512	4100
29	53	1537	4100
30	52	1550	4100

The
Great Western
Life Insurance Co.

Kansas City, Mo.

No. -8303-

-ARTHUR G. TRAVEL-

Age-27-

Amount \$ 5,000.-

ANNUAL PREMIUM \$ 24.70

Twenty Payment Life

Guaranteed Annual Dividends

Keywords: child sexual abuse; disclosure; social support

COPY

In event of death, money shall be given _____
to the Company at _____

It is not necessary for the Licensed or the Bank-
ing to maintain any period in which any benefit
provided in this contract. They and company will
be served by working alone in the Company or in
other.

501110

— **1997** —

Kendall County, Missouri

MANAGED BY A QUALITY SYSTEMS INTEGRATION COMPANY

OK, I'll be there. I'll be there. I'll be there.

1998

Q. Mrs. Snavelly, I will ask you, with reference to the payments of the premiums,—do you know whether the insured, your husband, paid the premiums due on this policy? A. He did.

Q. And do you know whether he received any receipt for the payment he made? A. Yes, sir.

Q. Mrs. Snively, look at those papers and tell me whether those are the receipts. A. They are.

By Mr. NILES.—Plaintiff offers in evidence her Exhibits “B,” “C” and “D.”

By Mr. O'CONNOR.—No objection.

(Whereupon said Exhibits "B," "C" and "D" were admitted in evidence, and are as follows, to wit:)

Plaintiff's Exhibit "B."

Office of
THE GREAT WESTERN LIFE INSURANCE
COMPANY.

Kansas City, Missouri.

Number 8172. Amount \$164.70.

Received of Arthur G. Snively of Livingston, Mont., the sum of one hundred sixty-four and 70/100 dollars (\$164.70), being the first annuam premium on policy No. 8303, for \$5000.

This receipt to be valid must be signed by the president or secretary, and countersigned by an authorized agent of the company. [21]

E. L. BIERSMITH,
Secretary.

26 *Great Western Life Insurance Company*

Countersigned this 31 day of December, 1907.

CHAS. H. RHODES,
Agent.

Plaintiff's Exhibit "C."

EVERY POLICY SECURED BY A DEPOSIT OF ITS FULL CASH
VALUE WITH THE STATE OF MISSOURI.

Office of

THE GREAT WESTERN LIFE INSURANCE
CO.

Kansas City, Missouri.

20 P. G. D.

Received, the annual premium of \$164.70
on Policy No. 8303 for \$5000, due December 27, 1908,
on the life of

Arthur G. Snively,
Livingston, Montana.

Read
notice
on
back

This receipt to be valid, must be signed by presi-
dent or secretary.

E. L. BIERSMITH,
Secretary.

Countersigned:

J. R. KRUSE,

Cashier.

DIVIDENDS USED TO PAY PREMIUM.

Paid as follows:

Premium	\$164.70
Special Income \$.40	
Coupon No. 1 \$24.65	\$ 25.05
	<hr/>
Cash due	\$139.65

Paid Mar. 5, 1909.

(Notice on back:)

Should this policy be restored at any time by acceptance [22] of premium, AFTER the same is due and payable, such restoration shall not create an obligation or precedent for waiving any conditions of the Policy in regard to subsequent non-payment of any premium on the day it falls due. The insured, by the acceptance of this receipt, agrees to this condition.

Plaintiff's Exhibit "D."

EVERY POLICY SECURED BY A DEPOSIT OF ITS FULL CASH
VALUE WITH THE STATE OF MISSOURI.

Office of
**THE GREAT WESTERN LIFE INSURANCE
CO.**

Kansas City, Missouri.

20 P. G. D.

Received, the annual premium of \$164.70
on Policy No. 8303 for \$5000, due Dec. 27,
1909, on the life of

Arthur G. Snavely,
Livingston, Montana.

Read
notice
on
back

This receipt to be valid, must be signed by president or secretary.

JAMES CHAPPELLE,

Secretary.

Countersigned:

J. R. KRUSE,

Cashier.

(Testimony of Esta M. Snavelly.)

DIVIDENDS USED TO PAY PREMIUM.

Paid as follows:

Premium	\$164.70
Special Income	\$ 6.40
Coupon No. 2	\$26.15 32.55
<hr/>	
Cash due	\$132.15

Dec. 31, PAID. [23]

(Notice on back:)

Should this policy be returned at any time by acceptance or premium, AFTER the same is due and *apayable*, such restoration shall not create an obligation or precedent for waiving any conditions of the policy in regard to subsequent non-payment of any premium on the day it falls due. The insured, by acceptance of this receipt, agrees to this condition.

Q. Do you know, Mrs. Snavelly, how these receipts were received? A. Through the mail.

Q. After the death of the insured, Mrs. Snavelly, what, if anything, was done, to your knowledge, with reference to notifying the company of his death?

A. A death certificate was made out and sent to them.

Q. How long after his death was it,—the proof of loss that you made?

A. Ten or fifteen days.

Q. Do you know, Mrs. Snavelly, who sent the notice and proof? A. I do.

Q. Who did? A. Dr. Beeson.

Q. Do you know, Mrs. Snavelly, whether the company received the notice of death and proof of the

(Testimony of Esta M. Snavely.)

claim? A. I do.

Q. You say they did receive it? A. Yes, sir.

Q. Has settlement,—payment,—ever been made on this [24] policy, Mrs. Snavely? A. No, sir.

Cross-examination.

(By Mr. MILLER.)

Mrs. Snavely, will you examine this letter (handing letter to witness) and tell me whose signature that is, if you know?

A. It is my husband's signature.

Q. The insured? A. Yes, sir.

Q. You received a communication from the company in relation to the proof of loss, did you?

A. Yes, sir.

Q. Did you have the death proofs made by Dr. Beeson?

A. The blanks were filled out by Dr. Beeson.

Q. You know nothing about the contents of those blanks, do you? A. No.

Q. Did you meet a representative of the company by the name of Thompson in Mr. E. M. Niles' office, after the proofs of death had been sent in,—in Livingston, Montana?

A. I don't remember the name. I met their representative there.

Q. Did he or did he not tender you on behalf of the company the money that had been paid by your deceased husband as a premium in connection with the insurance policy?

By Mr. GIBSON.—That is objected to, as it would be incompetent, irrelevant and immaterial to tender

(Testimony of E. M. Niles.)

the return [25] of the premiums after the death of the insured.

By the COURT.—It would not be proper cross-examination anyway. Objection sustained.

(Exception noted.)

(At this time it was agreed between counsel for the respective parties, on the suggestion of the Court, that the policy, Plaintiff's Exhibit "A," should be considered as having been read to the jury.)

(Witness excused.) [26]

[Testimony of E. M. Niles, for Plaintiff.]

E. M. NILES, duly called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GIBSON.)

Q. State your name. A. E. M. Niles.

Q. Your residence? A. Livingston, Montana.

Q. What is your occupation?

A. Attorney at law.

Q. Are you one of the counsel for the plaintiff in the case now on trial here? A. Yes, sir.

Q. Were you consulted by the beneficiary in this policy, Esta M. Snively, in regard to mailing notices of death and proofs of loss to the Great Western Life Insurance Company after the death of her husband in 1910?

By Mr. O'CONNOR.—Objected to as immaterial and irrelevant, without any issues in the case.

(Objection overruled. Exception noted.)

A. Yes, sir.

Q. At the request of the plaintiff in this case, did

(Testimony of E. M. Niles.)

you mail to the Great Western Life Insurance Company a notice that Arthur G. Snavely had died?

A. I did. I mailed the notice of his death.

Q. Did you receive from the company a reply to the notice that you sent them of his death?

A. I received a notice in reply, yes, sir. [27]

(Paper handed to the reporter by Mr. Gibson and marked for identification Plaintiff's Exhibit "E.")

Q. I now hand you plaintiff's exhibit and ask you what that is?

A. That is a letter I received from the company in reply to my notice of proof of death and asking them for proof blanks.

By Mr. GIBSON.—We now offer Plaintiff's Exhibit "E" in evidence.

By Mr. O'CONNOR.—No objection.

(Whereupon said Plaintiff's Exhibit "E" was admitted in evidence, and is as follows:)

Plaintiff's Exhibit "E."

**THE GREAT WESTERN LIFE INSURANCE
CO.**

Office of Auditor.

Kansas City, Mo., July 15, 1910.

Re Policy No. 830—Arthur G. Snavely (Deceased).

Mr. E. M. Niles,

Livingston, Montana.

Dear Sir:—

We are in receipt of your letter of the 11th inst., notifying us of the death of the above party. Enclosed find "Proof or Death" blanks which kindly

(Testimony of E. M. Niles.)

have filled out at your earliest convenience. Claimant's statement is to be made out by the beneficiary, Esta M. Snavelly. Kindly see that all of the information asked for is properly given, have all signatures witnessed before Notary Public, and be sure to attach certificate given by the clerk of the Court of Record, which certifies as to the authority of the Notary to act, [28] the genuineness of his signature, etc. Upon receipt of completed proofs, same will be given prompt attention.

Yours very truly,

J. R. KRUSE,

Auditor.

Q. Did you cause to be made out the blanks of proofs of death referred to in that communication, Mr. Niles? A. I did, sir.

Q. And did you cause them to be forwarded to the Great Western Life Insurance Company?

A. I mailed them to them.

Q. Did you receive any acknowledgment of the receipt of the proofs of death?

A. I received a communication from the company to that effect.

(Paper handed to the reporter by Mr. Gibson and marked Exhibit "F.")

By Mr. O'CONNOR.—No objection.

(Whereupon said Plaintiff's Exhibit "F" was admitted in evidence, and is as follows:)

(Testimony of E. M. Niles.)

Plaintiff's Exhibit "F."

**THE GREAT WESTERN LIFE INSURANCE
CO.**

Office of Auditor.

Kansas City, Mo., September 2, 1910.

Mr. E. M. Niles, Attorney. [29]

Livingston, Montana.

Dear Sir:—

We wish to acknowledge receipt of proofs of death of Arthur G. Snavely, but owing to information that we have received in reference to this case, we shall be obliged to delay the settlement of this matter until we are satisfied. We shall use due diligence.

Yours very truly,

J. R. KRUSE,

Auditor.

Cross-examination.

(By Mr. MILLER.)

Q. If you know who it was that swore Dr. Beeson to the medical proof of loss, you may state.

By Mr. GIBSON.—We object to that as not proper cross-examination.

By the COURT.—What does the policy call for with respect to notice and proof of death?

By Mr. GIBSON.—Does not call for proof, your Honor.

By Mr. MILLER.—I think we will connect it up.

By the COURT.—I don't think that that would be material, Mr. Miller.

A. I don't remember.

By the COURT.—I suppose the proof shows for

(Testimony of E. M. Niles.)

itself, does it not?

Q. I will ask you, if you know, whose signature that is, showing you the claimant's statement on proof of loss? A. That is J. B. Beeson's. [30]

Q. Dr. Beeson's? A. I think so, yes, sir.

Q. Whose signature is this?

A. That looks very much like mine.

Q. I will ask you to examine this document and state whether you ever saw it before.

A. A good deal of my writing on there, Mr. Miller. I have seen the document before.

Q. Is that the claimant's statement that was caused to be made out by Mrs. Snively, and that you made out in connection with Dr. Beeson and Richard Brown, T. J. Thelan and S. M. Grigsby, and caused to be forwarded to the company?

A. That is the claimant's statement.

Q. It is the one that you caused to be forwarded to the company, is it? A. That is the one, yes, sir.

Q. Mr. Niles, were you acquainted with Arthur G. Snively during his life time? A. Yes, sir.

Q. Had you frequently seen his signature?

A. Yes, sir.

Q. I will ask you to examine the signature on this paper, purporting to be certificate of health and renewal contract, and state if you know whose signature that is.

By Mr. GIBSON.—That is objected to as not proper cross-examination.

By the COURT.—He may identify the signature for the purpose of use later.

(Testimony of E. M. Niles.)

A. I think, Mr. Miller that is the insured's signature.

Q. You would be willing to state that it was, would you? [31]

A. Why, it resembles it. I think that is his signature. I would not swear positively.

(Witness excused.)

By Mr. GIBSON.—The plaintiff rests. [32]

[Testimony of Hal Van Doren, for Defendant.]

HAL VAN DOREN, duly called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. You may state your name.

A. Hal Van Doren.

Q. Where do you reside?

A. Livingston, Montana.

By Mr. GIBSON.—We would like to make an objection at this time. The plaintiff objects to the introduction of any evidence to establish the allegations of fraud and fraudulent representations contained in the answer, as having been made in the application for the policy and the application for reinstatement, upon the ground and for the reason that the policy of insurance in evidence in this case contains the provision that this contract is incontestible after one year from date of issue, and that more than two years had elapsed from the date of the issuance of the policy until the death of the insured, and that more than one year had elapsed from

the date of the issuance of the policy or the reinstatement of the policy until the death of the insured.

(After argument on the objection by counsel, the Court took the matter under advisement until two o'clock.) [33]

**[Proceedings Had] Friday, May 31, 1912, 2 P. M.—
Opinion on Objection to Admission of Certain
Proof.]**

By the COURT.—In ruling on the objection to the admission of any proof on the part of the defendant to support its allegations of falsity and fraud on the part of the insured in his application for reinstatement of this contract or policy, the Court will say that in the policy or the contract here involved the company agrees, first, that though for default in payment of premiums the insured would automatically forfeit the larger part of the benefits of the contract, yet the insurer, the company, would fully reinstate the contract at any time that the insured made written application therefor, together with evidence of his insurability satisfactory to the insurer, and the payment of all premiums in default with interest; and second, the company agreed that the contract would be incontestible after one year from the date of issuance. The insured did default in the payment of the premiums, and thereafter made written application for reinstatement of the contract, wherein he recited that he was in good health and free from every ailment and complaint; that there had been no change in family history; that he had no sickness nor ailment of any kind, nor been at-

tended by a physician, other than that he had had an operation for appendicitis and had entirely recovered therefrom. The insured also added in his application for reinstatement that he renews the statements and agreements contained in the original application, and expressly agrees that if any answer or statement contained therein, or if any statement contained in the application for reinstatement be untrue in any respect, then the policy is and shall continue [34] to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. Upon receipt of that, apparently, the contract, the policy, was reinstated, and all premiums, undoubtedly, paid, as appears from the evidence, and that would be the presumption in the absence of any proof to the contrary. In my opinion, the reinstatement of the policy revived and set in action all the terms and conditions thereof. I think that would be conceded, that would mean not only the obligation on the part of the company to pay so much insurance money to the beneficiary if the insured died, and not only upon the part of the insured to pay his premiums, but it also revived the promise of the company that the policy will be incontestible after one year from date of issuance. If the contract reinstated is to be viewed as a new contract, taking effect as of the date of reinstatement, such date is the date of issue, within the meaning of the incontestible clause, one year after which the contract would again become incontestible for any reason. This incontestible clause contains absolutely no exception. The policy is invulnerable to any attack

that the company might make upon it, except the failure to pay the premiums, which, of course, is not plead here, and, apparently, there was no failure after the reinstatement. It is maintained by all the cases, so far as I have been able to find, that the incontestible clause cuts off the defense of fraud or falsity on the part of the insured in procuring the policy originally when the time limited has run, and it seems to me that the same principle must apply in reference to the reinstated contract. The contract is the same. It contains the same terms and conditions, including the same incontestible [35] clause, which latter is, of course, revived with the reinstatement of the contract, and, as the Court holds, begins to run against falsity or fraud by the insured in inducing the new or reinstated contract, from the date of such reinstatement. This also seems to be upheld by the Galbraith Case, 115 Tenn. 471, which is the only case squarely on the point which has been submitted to me. But upon principle, I can see no reason why it would not apply, if this was a new contract, on the reinstatement,—and I do not believe it is, because the original contract had never been absolutely abrogated and a nullity. But if it is a new contract, or a revived contract, it is a new, or revived contract with the incontestible clause in it, and it must serve the same purpose in the new or revived contract that it did serve, for falsity or fraud, if any, in procuring the contract originally. This incontestible clause, of course, is a very valuable part of the contract, and is put there by the insurance company as an inducement to men to accept insurance. They

have, by reason of that clause, the assurance that after their policy has lived so long and they have kept up their premiums, if they should die or live, and especially if they should die, their beneficiaries will not be confronted with a defense of fraud or false statements, when their mouths are closed by death. Hence, it furnishes a great inducement for men to enter into engagements with the insurance company. The fact that the application for reinstatement contains the condition that the reinstatement shall be null and void and of no effect if the warranty and representations be untrue, is, as I view it, immaterial, for it is absurd to hold that the parties intended that the [36] contract was never of force because of falsity and fraud, and yet they proceeded to incorporate an incontestible clause under which, when the time limit had expired, falsity and fraud would be no defense. A case somewhat like this is *Mutual Reserve Fund Life Association vs. Austin*, 142 Fed. 398. There it was originally agreed between the parties that the policy would be of no force or effect unless, when it was delivered to the insured, he was in good health. But it had in it an incontestible clause cutting off all defenses after three years, so far as fraud is concerned. And it was maintained in that case by the insurance company that, in view of the agreement that the policy would never be in effect unless delivered when the insured was in good health,—and it was conceded that it was delivered when he was not in good health,—the policy never became a binding contract, for failure of condition precedent. I notice that where that case is

reported in the L. R. A., it is said that is the first time the defense was ever made. However, the Circuit Court of Appeals refused to consider that a valid defense on the part of the insurance company, and held that, under the conditions inserted by the parties, it did become effective on delivery and set in motion the incontestible clause, to cut off all defenses based upon fraud and falsity after a certain term. Again, the Court views these warranties and conditions here as *nudum pactum*. Under the contract, it was to be reinstated upon written application, with evidence of insurability satisfactory to the company. Nothing further could be exacted by the insurer, and if the insurer did exact anything further, or if the insured voluntarily furnished anything further, it binds him and his [37] beneficiaries not at all. The original contract relieved the insured of any obligation to do anything but to furnish satisfactory evidence of his insurability. He did furnish that evidence, and, of course, presumptively, to the satisfaction of the company, as they acted upon it. But he also furnished these warranties and conditions, for violation or falsity of which the reinstatement was to be null and void. Being voluntary and without consideration, they cannot be availed of by the company as a defense here. Of course, it will be observed that if they were binding and untrue, they would serve to defeat reinstatement, however honestly and in good faith believed to be true when made by the insured. I observed this morning that it was immaterial whether they were warranties or whether they were not warranties, but mere representations,

for whether they were honestly made and believed in by the insured, or whether they were falsely and fraudulently made for the purpose of deceiving the company, they were equally binding, and, if untrue, would render the policy void. They virtually rise to the dignity of warranties. With reference to section 5593 of the Revised Statutes of Montana, I am not prepared to say it has any application here. While it would apply to the original contract, yet the original policy is supplemented by an application for reinstatement. And I think the application would be admissible in spite of that section of the Revised Statutes, if otherwise permissible, and not cut off by virtue of the incontestible clause. Since more than one year elapsed between the reinstatement of the policy—contract—and death of the insured before any attack or defense for fraud or falsity was made thereon by the insurer, I am of [38] the opinion such attack or defense is cut off and barred by the incontestible clause in the contract. And the objection to the admission of any evidence of falsity or fraud in the application for reinstatement is sustained.

(Exception noted.)

**[Motion for Judgment on Pleadings and Order
Denying Motion.]**

By Mr. O'CONNOR.—Now, if the Court please, this practically puts an end to the case. The defendant moves the Court for judgment on the pleadings, for the reason that the plaintiff is seeking to recover wholly upon the policy as issued originally, and not upon the policy together with the contract of rein-

statement, both of which constitute the plaintiff's cause of action.

By the COURT.—I am inclined to look upon the contract which, in some of its parts, was terminated, but which became fully alive when it was reinstated. It is my recollection that it is the settled practice in this State, if there is a departure in the reply from the complaint, that it must be taken advantage of before the trial. The motion will be denied.

(Exception noted.)

**[Motion for a Directed Verdict, etc., and Order
Denying Motion of Defendant.]**

By Mr. GIBSON.—The plaintiff at this time moves the Court to direct the jury to find a verdict for the plaintiff, in the amount of the policy, five thousand dollars, together with interest thereon at the rate of eight per cent per annum from the 3d day of July, 1910.

By the COURT.—I think it would carry interest from the time you furnished the proofs.

By Mr. O'CONNOR.—I wish to make another motion—

By Mr. GIBSON.—I will amend that to make it—

By Mr. O'CONNOR.—We ask the Court to instruct the jury [39] to return a verdict for the defendant, for the reason that the plaintiff has wholly failed to offer any evidence to the effect that proofs of death were furnished the defendant company, as was required by the terms of the policy.

By the COURT.—My recollection is, and I think the witness, Mr. Niles himself, testified to sending on the proofs and getting a written acknowledgment.

What is the date of that acknowledgment?

By Mr. GIBSON.—September 2d, 1910.

By the COURT.—The motion of the defendant will be denied.

(Exception noted.)

[Order Granting Motion to Direct Jury to Render Verdict for Plaintiff.]

By the COURT.—The motion to direct the jury to render a verdict in favor of the plaintiff and against the defendant for five thousand dollars, with interest thereon from the 2d day of September, 1910, at the rate of eight per cent per annum, is granted.

(Whereupon the Court instructed the jury to find a verdict for the plaintiff and against the defendant, and such verdict was thereupon returned by the jury.)

To which direction defendant excepted.

[Order Allowing, etc., Bill of Exceptions.]

The above and foregoing bill of exceptions, which contains all of the evidence and testimony given upon the trial of the above-entitled action, together with the rulings of the Court thereon and the exceptions taken to such rulings, and also all other proceedings had at the trial of the within action, is hereby allowed, signed, settled, approved and ordered by me to be filed and made a part of the record in said cause as defendant's bill of exceptions on motion for a new trial in the above-entitled action. I further certify

that the same is true and correct.

Dated this 8th day of Aug., A. D. 1912.

GEO. M. BOURQUIN,

Judge.

Filed Aug. 8th, 1912.

GEO. W. SPROULE,

Clerk. [40]

And thereafter, on Nov. 13, 1912, defendant's assignment of errors was duly filed herein, being in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, namely:

I.

The Court erred in sustaining the objections made by the plaintiff to the introduction of any evidence to establish the allegations of fraud and fraudulent representations contained in the answer as having been made in the application for the policy and the application for reinstatement to which ruling of the Court,

defendant duly excepted.

II.

The Court erred in denying the motion made by the defendant to instruct the jury to return a verdict for the defendant.

III.

The Court erred in denying the motion made by the defendant for judgment on the pleadings, to which ruling of the Court defendant duly excepted.

IV.

The Court erred in sustaining the motion made by the plaintiff to direct the jury to find a verdict for the plaintiff in the amount of the policy, namely Five Thousand (\$5,000) Dollars, together with interest, to which action of the Court defendant duly excepted.
[41]

V.

The Court erred in instructing the jury to find a verdict for the plaintiff and against the defendant for the sum named in the policy, to which action of the Court defendant duly excepted.

H. J. MILLER,

Attorney for Defendant.

Due timely and legal service of the foregoing and a receipt of a true copy is hereby acknowledged this 12th day of November, 1912.

E. M. NILES,

FRED L. GIBSON,

Attorneys for Plaintiff.

Filed Nov. 13, 1912. Geo. W. Sproule, Clerk.

[42]

And thereafter, on Nov. 13, 1912, petition for writ of error was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

versus

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

Petition for Writ of Error.

The above-named defendant, the Great Western Life Insurance Company, feeling itself aggrieved by the judgment of this Court made and entered herein on the 11th day of June, 1912, in favor of the plaintiff for the sum of Fifty-seven hundred ninety-eight 80/100 (5798.80) Dollars damages, comes now by H. J. Miller, its attorney, and petitions the said Court for a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also asks that an order be made fixing and allowing the amount of security which defendant shall give and furnish upon said writ of error.

H. J. MILLER,

Attorney for Defendant.

Due timely and legal service of the foregoing and a receipt of a true copy is hereby acknowledged this

12th day of November, 1912.

Petition granted.

E. M. NILES,
FRED L. GIBSON,
Attorneys for Plaintiff.
GEO. M. BOURQUIN,
Judge.

Filed Nov. 13, 1912. Geo. W. Sproule, Clerk.
[43]

And thereafter, on Nov. 14, 1912, an order allowing writ of error was duly entered herein, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

versus

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

Order Allowing Writ of Error and Fixing Bond.

At a stated term, to wit, the September term, 1912, of the District Court of the United States of America, in and for the District of Montana, held at the courtroom in the city of Butte, Montana, on the 14th day of November, 1912, upon motion of H. J. Miller, Esquire, attorney for the defendant above named, and upon the filing of a petition for a writ of error and the assignment of errors, it is ordered that a

writ of error be, and the same is hereby allowed for a review in the United States Circuit Court of Appeals for the Ninth Circuit, of a judgment heretofore entered in this cause.

The amount of bond on said writ of review be, and the same is hereby, fixed in the sum of Sixty-five Hundred (\$6500.00) Dollars, which bond, when given and approved, shall operate as a supersedeas.

GEO. M. BOURQUIN,
Judge.

Filed and entered November 14, 1912. Geo. W. Sproule, Clerk. [44]

Thereafter, on Dec. 2, 1912, bond on writ of error was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

ESTA M. SNAVELY,
Plaintiff,
versus

GREAT WESTERN LIFE INSURANCE COMPANY,
Defendant.

Bond [on Writ of Error].

KNOW ALL MEN BY THESE PRESENTS:
That we, the Great Western Life Insurance Company, as principal, and National Surety Company, a corporation, duly authorized to act as a surety, are held and firmly bound to the above-named plaintiff, in the sum of Sixty-five Hundred (\$6500.00) Dollars,

for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed and dated this 27th day of November, 1912.

Whereas, the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled cause in the said above-named court on the 11th day of June, 1912;

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute the said appeal to effect and answer all damages and costs, if it fails to make its defense good, and obey the orders of the Court herein and pay this said judgment herein in the sum of \$6500.00 in case the same is affirmed, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

NATIONAL SURETY COMPANY.

By M. J. WALSH,

Its Attorney in Fact.

By JAMES F. O'CONNOR,

Attorney in Fact.

Aprvd.—BOURQUIN, J.

Dec. 2, 1912.

Filed Dec. 2, 1912. Geo. W. Sproule, Clerk. [45]

Thereafter, on December 3, 1912, a Writ of Error was duly issued herein, which said Writ of Error is hereto annexed and is in the words and figures following, to wit: [46]

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States to the Honorable
Judge of the District Court of the United States,
for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between Esta M. Snively, Plaintiff, and Great Western Life Insurance Company, Defendant, a manifest error hath happened, to the great damage of the said Great Western Life Insurance Company, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in said Circuit, on the second day of January, 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, [47] the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to

the laws and customs of the United States, should be done.

WITNESS The Honorable GEO. M. BOURQUIN, Judge of the United States District Court, for the District of Montana, this 3d day of December, A. D. 1912, and the 137 year of the Independence of the United States of America.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States for the District of Montana.

Service of the above and foregoing writ of error is hereby acknowledged, and copy thereof received, this 5th day of December, A. D. 1912.

E. M. NILES and

FRED L. GIBSON,

Attorneys for Plaintiff and Defendant in Error.

[48]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,

Clerk. [49]

[Endorsed]: Original. No. 1041. In the District Court of the United States, District of Montana. Esta M. Snavely, Plaintiff, vs. Great Western Life Insurance Company, Defendant. Writ of Error, Filed and entered Dec. 6th, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [50]

And thereafter, on December 3, 1912, a Citation was duly issued herein, which said Citation is hereto annexed, and is in the words and figures following, to wit: [51]

Citation on Writ of Error.

United States of America,
District of Montana,—ss.

To Esta M. Snavely, Greeting:

YOU are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, on the 2d day of January, 1913, next, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States, for the District of Montana, wherein Great Western Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done by the parties in that behalf.

Given under my hand at the city of Butte, in the District of Montana, this third day of December, in

the year of our Lord one thousand nine hundred and twelve.

GEO. M. BOURQUIN,

U. S. District Judge, District of Montana.

Service of the above and foregoing citation is hereby acknowledged, and copy thereof received, this 5th day of December, A. D. 1912.

E. M. NILES and

FRED L. GIBSON,

Attorneys for Plaintiff and Defendant in Error.
[52]

[Endorsed]: No. 1041. In the District Court of the United States, District of Montana. Esta M. Snavely, Plaintiff, vs. Great Western Life Insurance Company, Defendant. Citation. Filed and entered Dec. 6th, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [53]

And thereafter, on December 9th, 1912, a Stipulation as to the record and exhibits herein was filed in said cause, being as follows, to wit: [54]

*In the District Court of the United States for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

versus

GREAT WESTERN LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

Stipulation [Concerning Transcript of Record and Original Exhibits].

It is hereby stipulated by and between the respective parties, plaintiff and defendant in the above-entitled action, by and through their attorneys, that all of the papers used in the above case in connection with the removal of the same from the State courts to the above-entitled court, may be omitted from the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

It is also further stipulated that all original exhibits* in the case may be sent directly to the said United States Circuit Court of Appeals for the Ninth Circuit, including Exhibit "A," which is a copy of the policy sued on in the above-entitled cause and which is set forth in the complaint herein on file.

Done at Livingston, Montana, this 5th day of December, 1912.

E. M. NILES,
FRED L. GIBSON,
Attorneys for Plaintiff.
H. J. MILLER,

.....,
Attorneys for Defendant.

Filed Dec. 9, 1912. Geo. W. Sproule, Clerk. [55]

*Copies of all original exhibits appear in Bill of Exceptions.

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 56 pages, numbered consecutively from 1 to 56, is a true and correct transcript of the pleadings, process, verdict and judgment, and all proceedings had in said cause, and of the whole thereof, except those portions omitted by stipulation, as appears from the original files and records of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the costs of the transcript of record amount to the sum of Twenty and 30/100 Dollars (\$20.30), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court for the District of Montana, at Helena, Montana, this 13th day of December, A. D. 1912.

[Seal]

GEO. W. SPROULE,
Clerk. [56]

[Endorsed]: No. 2231. United States Circuit Court of Appeals for the Ninth Circuit. Great Western Life Insurance Company, a Corporation, Plaintiff in Error, vs. Esta M. Snively, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

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for the Ninth Circuit.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT WESTERN LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error.

vs.

ESTA M. SNAVELY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action brought by the defendant in error against plaintiff in error to recover the sum of \$5,000.00 and interest on an Insurance Policy issued by plaintiff in error on the life of one Arthur G. Snavely who died on the 3rd day of July, 1910, and who was the husband of defendant in error.

The policy was issued on the 27th day of December, 1907, and lapsed and became null and void on the 27th day of January, 1909, by reason of the Insured failing to pay the premiums as they became due under the terms of the policy (Tr. page 12).

On the 24th day of February, 1909, the Insured made application in writing to the Insurer (plaintiff in error) to renew the policy (Tr. page 8). That, among other things, the reinstatement contract provided as follows: "That I am in good health and free from every ailment and complaint. . . . That I have not had any injury, sickness or ailment of any kind and that I have not consulted or been prescribed for by any doctor or received any medical treatment since the date of my original application on which said policy was issued, except as here stated. 'Operation Appendicitis, Sept. 1st, 1908. Off duty two weeks, entirely recovered,' and I hereby renew the statements and agreements contained in said original application and expressly agree that if any answer or statement made or contained herein be untrue in any respect, then said policy is and shall continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. Said policy shall not be revised until the certificate and revival contract be approved by this Company."

Insured paid all premiums due under the terms of policy and contract of reinstatement.

Insurer, plaintiff in error, is resisting payment of the policy upon the ground that the statements made by Insured in application for reinstatement in regard to his being in good health and not having any sickness or ailment of any kind were false and untrue; and that at that time he was suffering from a disease from which he died, and that said statements were fraudulently made by the Insured, knowing them to be false and untrue and for the purpose of securing a revival of the policy.

These fraudulent representations on the part of the Insured

are set forth in Insurer's answer as an affirmative defense (Tr. pages 6-11).

Defendant in error who is beneficiary under the policy insists that, as the policy contains a provision to the effect that it is incontestible after one year from the date of issuance, and as it was in effect for a period of one year or more before it lapsed for failure to pay the premiums, and as it was in effect for a period of one year or more after reinstatement before Insured died, the Insurer, plaintiff in error, even though the Insured fraudulently represented the condition of his health in the application for reinstatement, knowing his representations to be untrue, cannot now avail itself of such defense in the face of the incontestibility clause. *Supra*.

A Demurrer was filed by the defendant in error to that portion of the answer containing the defense above outlined and it was by the Honorable Carl Rasch, overruled. A reply was thereafter filed by defendant in error denying the defense of fraud. Thereafter the cause was tried before the Honorable George Bourquin, sitting with a jury. After defendant in error rested and the plaintiff in error commenced to offer its proof in support of the allegations of the answer, the defendant in error interposed an objection to the introduction of any evidence to prove the allegations of fraud in the answer and the same was sustained, to which ruling of the court an exception was taken (Tr. pages 35-41).

Thereupon the court on motion directed a verdict in favor of the defendant in error, to which action of the court plaintiff in error duly excepted (Tr. page 43).

ASSIGNMENT OF ERROR.

The court erred in sustaining the objection made by the defendant in error to the introduction of any evidence to establish the allegations of fraud and fraudulent representations contained in the answer as having been made in the application for the policy and the application for reinstatement (Tr. pages 35-43).

ARGUMENT.

The argument used by the plaintiff in error in discussing this assignment of error is applicable to the error complained of where the court directed the jury to return a verdict for the defendant in error, as the motion for the directed verdict was sustained upon the same ground that moved the court to sustain the objection to the introduction of evidence to prove fraud, etc.

As a preface of what is to follow, will say that we are unable to find a decision of any court construing an application for reinstatement in an Insurance Company which contained the representations and agreements and warranties contained in the application in question.

In the application for reinstatement, you will observe that the Insured agreed as follows: *"That I have not had any injury, sickness, ailment of any kind and that I have not consulted or been prescribed for by any physician or received any medical treatment since the date of my original application on which said policy was issued, except as here stated, 'Operation for appendicitis, Sept. 1st, 1908, off duty two weeks, entirely recovered,' and I hereby renew the statements and agreements contained in said original application and expressly agree that if*

any answer or statement contained herein is modified in this contract or if any statement contained herein be untrue in any respect, then said policy is and shall continue to be absolutely null and void and reinstatement thereof inoperative and of no effect."

We contend first that the Insured made representations as to the condition of his health that amounted to warranties; then he expressly said that if any of those representations or warranties were untrue in any respect that the policy should continue to be null and void and reinstatement thereof inoperative and of no effect. He not only expressly made this statement but he expressly agreed that the policy was to remain null and void and be inoperative and of no effect in the event that there was any one of the representations aforesaid untrue.

For the purpose of this argument, the position of the plaintiff in error in regard to the falsity of the representations must be taken as true. As heretofore stated, we have been unable to find a decision of the court construing a like contract of reinstatement, but if agreements are to be observed and to be given any sanctity by the courts, it seems that this court ought to take the Insured at his word and not make any better contract for him than he himself did.

The following cases referred to touch upon the case and in a measure are authority for the position taken by the plaintiff in error:

Sweeney vs. Life Insurance Co. 38 L. R. R. 297.

Filling vs. Pope, 115 U. S. 213.

Northington vs. Wright, 115 U. S. 188.

The effect of a stipulation amounting to a warranty is to

render the accuracy of the state of facts alleged in it a condition precedent of the Insurer's responsibility and it becomes bound only "if" and "in the event that" they are literally as the assured had represented them to be.

Angell on Life and Fire Ins. Co., Sec. 307.

The Supreme Court of Texas in the case of *Ash vs. Life Ins. Co.* 26 Texas, Civil Appeal 502, which is probably quoted more by the courts generally in the United States touching upon matters such as are involved herein, holds that the falsity of such representations or warranties renders the renewal contract invalid. Some courts have seemingly held that the renewal contract together with the policy constituted the old original contract between the parties, but this view is not upheld by the courts generally.

The reinstatement application constitutes a new contract and to it the court must look to see what the parties agreed to.

Pacific Mutual Life Ins. Co. vs. Galbraith, 91 S. W. 204.

Welsh vs. Union Life Ins. Co. 78 N. W. 583 holds that in the face of an incontestability clause, that fraud vitiates and destroys every contract into which it enters.

Many courts have held that a contract, wherein fraud is waived as a defense, is void as against public policy.

Reagan vs. Life Ins. Co. 2 L. R. A. (N. S.) 821.

These cases, while not construing a contract such as is under consideration in this case, will aid the court somewhat in reaching its conclusion.

We respectfully submit that the objection to the introduction

of such evidence should have been overruled and that the court erred in sustaining such objections and likewise erred in directing a verdict in favor of the defendant in error.

Respectfully submitted,

H. J. MILLER AND

JAMES F. O'CONNOR.

Attorneys for Plaintiff in Error.

Section 5050
Montana Code 1907.

Due legal and timely service of the foregoing brief, and a receipt of a true copy thereof is hereby acknowledged this _____ day of February, 1913.

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT WESTERN LIFE INSURANCE
COMPANY, a Corporation,

Plaintiff in Error,

vs.

ESTA M. SNAVELY,

Defendant in Error.

No. 2231.

BRIEF OF DEFENDANT IN ERROR.

The statement of the case by the plaintiff in error in the brief is substantially correct.

ARGUMENT.

The plaintiff in error contends that the re-instatement of the policy constituted a new contract, based on the terms of the application for re-instatement and that as the statements in the application were alleged to be false the policy was not revived.

The defendant in error contends that the policy, although it had lapsed by failure to pay premiums, was never entirely null and abrogated, but that by its terms it could be revived by the insured and in fact was revived; and secondly that if the policy was so revived, more than one year elapsed before the death of the insured, and hence by the terms of the policy it is incontestable. Upon a careful investigation of the authorities cited by the counsel we find no real basis for the contention of the plaintiff in error, and the cases cited we submit are not in point and do not, either by inference or analogy, support its contention in the case at bar.

As to the first contention of the defendant in error that the policy was revived, it has been held that a condition of a policy of life insurance that the policy shall be void if premiums are not paid when due, means only that the policy shall be voidable and the breach may be waived.

Grigsby vs. Russell, 222 U. S. Sup. Ct. Rep. p. 149.

If under the contract it was to be re-instated upon written application with evidence of insurability, satisfactory to the company, we submit that nothing further could be demanded by the insurer, and if the insurer did demand anything further of the insured or if the insured voluntarily furnished anything more, it would not bind him.

“Under a provision in the policy the insured may be entitled, on such conditions as are imposed therein, to a restoration of the policy, which after such restoration continues to be the contract of the parties as before.”

25 Cyc. 847.

Goodwin vs. Provident Sav. Life Assurance Asso. 97
Ia., 226.

66 N. W. 157.

The policy provides, "That in case of default in the payment of any premium or interest, the company will re-instate the contract at any time, if not previously surrendered for its cash value, upon application by the insured to the company at its home office, with evidence of insurability satisfactory to the company, and the payment of all premiums that would have been paid if no default had been made."

In the application for re-instatement, which the company demanded of the insured, certain conditions were imposed which were not authorized by the terms of the policy, and the insured was compelled to subscribe to certain conditions therein which should not have been required of him. It is a well settled principle that such conditions are not valid and binding.

25 Cyc. p. 849.

Coburn vs. Life Indemnity Co., 55 N. W. 373.

Mutual Life Ins. Co., vs. French, 27 Am. Rep. p. 443.

In the case of the Pacific Mutual Life Insurance Company vs. Galbraith cited by counsel for the plaintiff in error, it seems to be there held that a re-instatement creates a new contract, that is a new assurance, though under the former policy, but it is observed that the court there holds,

"That if this be its nature, then it must operate in the future from the date of its re-instatement, and whatever

might be its original date or howsoever long it may have run, yet it would seem by the force of necessary logic to follow that the incontestable clause would begin its new life with the date of the new contract."

It will further be noticed that in the Galbraith case the period of time specified in the incontestable clause had not elapsed and the court held that evidence should have been admitted as to representations made in the application for re-instatement. But we submit that in the case just cited the question of whether the application for re-instatement contained demands not authorized by the policy does not appear and was not considered by the court, nor does it appear that the statements made in the application for re-instatement were any different from those made in the original application and it may be here assumed that those questions were not before the court, and the rule laid down by the court in the Galbraith case precludes the plaintiff in error in this case from contesting the payment of the policy upon any grounds whatever.

In the case of the Mutual Reserve Fund Life Association vs. Austin, 73 C. C. A. page 498, we have a case which is in point and which we submit is in support of our position in the case at bar. The contention of the company in that case was that the incontestable clause did not apply because the insurance policy was never in force, by reason of false representations made in the application. The policy in that case contains these provisions, to-wit: "If this policy of insurance shall have been in continuous force for three years from its date, it shall thereafter be incontestable, except for non-payment of premiums as herein provided, or for mis-statement of the age of the member

in the application therefor, subject to the provision hereof.”

A further provision in the policy is, “This contract shall not take effect until this policy is delivered to the member in person, during his life time and while in good health, nor until the first payment is paid in cash while said member is also in good health.”

The court states as follows:

“It is established as a fact that Austin was not in good health, within the meaning of the application for policy, either when the applications were made or when the policies were delivered, or when the first premiums were paid. It is further established that the policies were delivered to Austin on April 14, 1897, that he paid the first payment and all premiums as stipulated in each policy until his death, October 5, 1902. The company does not rely on false or fraudulent representations and disavows any intention to avoid its policies for breach of warranties. The contention was that the good health of the applicant was a condition precedent and that no contractual relation therefor ever existed between the applicant and defendant below.”

However, the Circuit Court of Appeals refused to consider that as a valid defense on the part of the insurance company and held that under the conditions inserted by the parties it became effective on delivery and set in motion the incontestable clause, so as to cut off all defenses based on fraud and falsity after the period in which, by the terms of the policy, the same was contestable.

In the case of *Carpenter vs. Providence Washington Insur-*

ance Co., 16 Peters, page 495, Mr. Justice Story said:

"It is not true, that because a policy is procured by misrepresentation of material facts, it is, therefore, to be treated in the sense of the law as utterly void ab initio. It is only voidable and may be avoided by the underwriters upon due proof of the facts, but until so avoided, it must be treated for all practical purposes as a subsisting policy."

It has been held, "That where a policy of life insurance, as well as the application therefor, stipulates that after the application was approved and the policy issued, it should be in force from the date of the application, a further provision in the application that the contract of insurance should not take effect until the payment of the first premiums, by the applicant during his continuance in good health, was only a provisional agreement, authorizing the insurer to withhold the policy until such payment in good health, and that an actual delivery of the policy by the company would estop it in the absence of fraud from asserting an avoidance of its contract, by reason either of the assumed ill health, or the non-payment of the premium; such stipulations having been asserted in the application as conditions to excuse the insurer from delivery of the policy, could not serve as grounds for invalidating the policy after delivery."

Grier vs. Mutual Life Insurance Co., 44 S. E. page 28.

The policy in the case at bar contains a clause as follows: "This contract is incontestable after one year from date of issue."

A clause now often inserted in policies, that after being

in force a specified time they shall not be disputed or contested, precludes any defense after the stipulated period, on account of false statements which were warranted to be true, even though they were made fraudulently.

25 Cyc. page 872. Cases cited.

4 Am. and Eng. Annotated, page 364 and notes.

The view taken by the court as to such a clause is that it merely operates as a short statute of limitations in favor of the insured and says within what time the falsity of the policy shall be contested, if at all.

Mass. Benevolent Life Asso. vs. Robinson, 104 Ga. p. 256.

Wright vs. Mutual Benefit Life Asso., 118 N. Y. p. 237.

13 Am. and Eng. Annotated Cases, page 305.

Kansas Mutual Life Insurance Co., vs. Whitehead, 123 Kan.

Where a life insurance policy contains a provision that it shall be incontestable after two years, such provision applies to representations required and made in a certificate of re-instatement after a lapse for non-payment of an assessment, and after two years the company is barred from contesting the policy on the ground that the statements contained in the re-instatement certificate are untrue.

Teeter vs. U. S. Life Ins. Asso., 54 N. E. p. 72.

Pacific Mutual Life Ins. Co., vs. Galbraith, 112 Am. S. R. p. 862.

Wright vs. Asso. 118 N. Y. p. 237.

23 N. E. p. 186.

In the case of Teeter vs. Insurance Co., above cited, we have a case which is practically identical with the one at bar and possessing the same principle involved in this case, and in that case the court said:

“That it seems to us after an examination of the contract that the defendant had two years after the re-instatement within which to investigate the condition of Teeters’ health at the time of making the re-instatement certificate, and that after that time the policy became again indisputable.”

The logic and soundness of that holding cannot be questioned and is in keeping with all of the authorities on the question, and is controlling in the case at bar.

The plaintiff in error states in his brief (page 5) that “this court ought to take the insured at his word and not make any better contract for him than he himself did.” Of course, the court does not make contracts. In this case the court is called upon to construe a contract which contains this clause: “This contract is incontestable after one year from date of issue.” The contract in which the clause is found and which the court is called upon to construe is a contract of life insurance; the clause was placed in the contract by the insurer to induce the assured to take out insurance and to give to the assured an assurance that after the policy had been issued one year, and if the premiums were paid and the insured should die, his beneficiary would not be met by a defense of fraud or misrepresentations in obtaining the insurance. This clause cuts off defenses based on alleged fraudulent representations in obtaining either the policy originally or its re-instatement.

Another point that was urged upon the argument of the objection made by the defendant in error to the admission of evidence to show fraud or fraudulent representations in the obtaining of the contract or its re-instatement was that the alleged fraudulent representations were contained in an application for insurance or in an application for re-instatement and were not made a part of or contained in the policy, the policy having been delivered in the state of Montana after Jan. 1st, 1908, and that under section 5593 of the Revised codes of the state of Montana of 1907, such application or statements made in it could not be received in evidence. That section of the Statutes of Mont. reads as follows:

“Sec. 5593. Every policy of insurance issued or delivered within this state on or after the first day of Jan., 1908, by any life insurance corporation doing business in the state shall contain the entire contract between the parties.”

This statute was evidently intended for the purpose of preventing an insurer from contesting the payment of insurance on grounds of alleged falsity of statements made in the application unless such application is set forth in the policy and made a part thereof.

This is pursuant to a wise and proper public policy. But the policy of insurance in this case by its own terms goes farther than the statute requires and the insurer promises that it shall not contest payment of the policy after one year from its date issue, if the insured shall pay the premiums as provided in the policy.

This is the clear and plain meaning of the language used. The clause contains no exceptions. The courts wherever incontestable clauses have been construed by them in policies of insurance have given the clause the meaning and application contended for by defendant in error in this case, and in truth the language of the clause is so clear and free from ambiguity that there is no room for construction, and none can be given the clause, other than the plain meaning of the words used. The plaintiff in error has failed to cite any authority in point as an examination of the cases cited will show, and in fact counsel virtually admits it in their brief.

We summarize as follows: It is admitted by the pleadings and by the policy in evidence that the policy would be forfeited for the non-payment of premiums and that it would again be re-instated upon the written application of the insured with satisfactory evidence of his insurability; that the policy did lapse for non-payment of premiums and that the insurance company did re-instate the policy and did accept the evidence that the insured offered as to his insurability.

There is no dispute but what the incontestable clause in a policy of insurance is valid and binding on the insurance company. The plaintiff in error claims that the incontestable clause in the case at bar does not take effect by reason of the fact that the representations made by the assured, in his application for reinstatement, are alleged to be false and fraudulent, but the plaintiff in error cited no authority, nor presents any logical argument in its support, whereas the case of Mutual Reserve Fund Association vs. Austin, above cited, holds absolutely to the contrary, and the logic and soundness of the reasoning of

the court in that case, we submit cannot be questioned.

We submit that the policy, though it had lapsed for non-payment, was never entirely abrogated and void. It, by its very terms, retained life and the insured, by virtue of the contract itself, had some rights under it, and one of the rights which the assured had was to have the policy reinstated by paying up the premiums and satisfying the company of his insurability. The insurance company did not and by virtue of the terms of the policy could not make any other terms with the insured only in accord with the terms of the policy. If the policy is re-instated, and this is admitted, then we have the same policy and the same contract we had before, no more and no less, and the only contract that has ever been between the parties was the original policy.

The plaintiff in error does not question the validity of the policy or of the incontestable clause up to the time the application was made for re-instatement, but now contends that the terms of the original contract are to be considered and interpreted by what the application for re-instatement sets forth, although the company compelled the insured to furnish more than the original policy called for as grounds for re-instatement.

We submit that everything contained in the application for re-instatement, further than what was necessary to state, as to the insurability of the insured, was given without any consideration passing to the assured and was not warranted or called for by the original contract, and hence is as the lower court stated, simply nudum pactum.

The plaintiff in error doesn't hope to prevail in this case un-

less it can establish the validity and competency of that part of the application for re-instatement, not directly authorized by the policy, and the insurance company would have this court take the position that plaintiff in error had the right to make any demands and insist on any exactions from the assured which it saw fit to impose, in order to re-instate the policy, and if this reasoning is sound the company could as well have demanded that the insured waive his right under the incontestable clause, or it could have gone farther and demanded a higher premium or made him terms less advantageous than the policy allowed. We contend that this argument is not sound, that the policy and the conditions therein stated are to control, and we have a right to assume that the assured considered the contract, the incontestable clause and the terms for re-instatement when he took out the policy and the assured has a right to depend upon the insurance company to carry out its terms of the contract.

It stands admitted that the assured has fully complied with his part of the agreement; the company has failed to carry out their terms of the agreement when they demanded more than was their right to receive from the assured before they would re-instate the policy, and we submit that what they demanded beyond what was their right to demand, is not binding on the assured, is without consideration, and ought not to be considered for any purpose whatever. It appears to us that no new contract was ever made, that the old contract, which had lapsed, was simply revived, and if that reasoning be true, then we cannot get away from the fact that the incontestable clause precludes the plaintiff in error from making any defense whatever.

If, upon the other hand, it may be considered as a new con-

tract having been made, which would consist of the old policy and the application for re-instatement, do we not still have the incontestable clause which would preclude the company from any defense on any grounds after the period of incontestability had elapsed, since the formation of the new contract? Could any line of reasoning prove that there could be any difference in the statements made by the assured when he first took out the policy, or in the statements he made when the policy was revived so far as the effect in the application of the incontestable clause is concerned? And hence we submit that whether the court may look at this policy of insurance in the case at bar, either as an old contract revived and re-instated, or whether it is a new contract, the terms of which are taken from the old contract, it is entirely immaterial, as the rights of the assured and the liabilities of the insurer are in either case identical under the terms of this policy.

It appears to us conclusively that, inasmuch as the policy was reinstated and revived, the insurer being satisfied with the insurability of the insured and accepting his premiums in full payment, and the period of incontestability having run, that the plaintiff in error is now estopped from questioning its own contract, the terms of which the insured accepted in taking out the policy.

We respectfully submit that the judgment appealed from should be affirmed.

E. M. NILES,
FRED L. GIBSON,
Attorneys for Defendant in Error.

